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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1281~~ 93

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, TRANSCONTINENTAL GAS PIPE LINE CORPORATION AND TEXACO, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Public Service Electric and Gas Company, Petitioner in the proceeding below, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on March 2, 1967.

Opinions Below

The Opinion of the Court of Appeals, issued January 18, 1967, is reported at 371 F. 2d 1. The Opinion and the Court's Judgment are reprinted herein as Appendix A *infra*, pp.

1a-12a). Opinion No. 449 and Order of the Federal Power Commission issued February 17, 1965 are reported at 33 F. P. C. 237. Opinion No. 449-A and Order on petition for rehearing before the Federal Power Commission issued April 16, 1965 are reported at 33 F. P. C. 818. The opinions and orders of the Federal Power Commission are reprinted at pages 271 and 299 of the Joint Appendix. The Examiner's decision is reported at 33 F. P. C. 242 (1964) and is reprinted in the Joint Appendix at page 167.

Jurisdiction

The Opinion of the Court of Appeals for the Third Circuit was issued on January 18, 1967 and Judgment was entered on March 2, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) (1948) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938); 15 U. S. C. §717r(b).

Questions Presented

1. Is the physical fact of original commingling and flow of natural gas sufficient to require the Federal Power Commission to assert jurisdiction over the entire transaction, within the meaning of the Natural Gas Act, where a producer delivers gas in Texas or Louisiana to a pipeline transmission company for interstate transportation and the pipeline company is obligated to deliver substantially the same volume of gas to the producer in New Jersey?

2. Is there a "sale for resale" within the meaning of Section 1(b) of the Natural Gas Act, when a producer delivers its gas to an interstate pipeline company in Texas and Louisiana and the pipeline commingles that gas with other gas admittedly in interstate commerce and delivers approximately the same volume of gas to the producer for use in the producer's refinery in New Jersey?

3. Is there a "transportation of natural gas" within the meaning of Section 1(b) of the Natural Gas Act by a consumer, when an interstate pipeline company delivers natural gas it transported in interstate commerce to a consumer in New Jersey and the consumer continues to transport the gas at high pressure some 4½ miles through public and private lands to its refinery?

4. Is there a denial of "Fair Administrative Procedure" where an Agency Hearing Examiner arrives at an essential finding herein by making his own calculations on material extracted from a bare application filed in a subsequent and unrelated docket on which the Agency held no formal hearing?

5. Did the Court err in affirming the Commission where the record does not substantiate the findings that the present or future public convenience and necessity *required* the issuance of the certificate within the meaning of Section 7(e) of the Natural Gas Act?

Statutes Involved

The statutory provisions involved are §§ 1(b), 7(c), 7(e) and 19(b) of the Natural Gas Act, 52 Stat. 821 (1938), as amended, and 15 U. S. C. §§ 717(b), 717f(c), 717f(e) and 717r(b). Also involved is Section 556(d) of the Administrative Procedure Act, 5 U. S. C. 556(d). These Sections are set forth in Appendix B, pp. 13a-17a.

Statement of the Case

The proceedings below were instituted by the filing of an application by Transcontinental Gas Pipe Line Corporation (Transco) on February 3, 1963, supplemented on three occasions, by which it sought a certificate under Section 7(c) and (e) of the Natural Gas Act for authority to transport

natural gas for Texaco, Inc. (Texaco) from the States of Louisiana and Texas to Westville, Gloucester County, New Jersey. From the point of delivery in Westville, Texaco would transport the gas some 4½ miles in its own converted 8-inch pipeline to its New Jersey refinery at West Deptford described as the Eagle Point Refinery. The proposal is set forth in a contract between Transco and Texaco dated February 7, 1963 (R. 132-157).[1]

The agreement provides that Texaco will deliver up to 8,000Mcf per day of firm gas and up to 16,000 Mcf per day of interruptible gas to Transco in Texas or Louisiana. Transco in turn will deliver approximately the same volumes of gas to Texaco in New Jersey. The parties recognize that due to operating conditions, deliveries into and deliveries from Transco's line may not balance on a daily or very short term basis. Thus, the contract provides that the quantities of gas delivered by Texaco into Transco's lines shall be balanced against the withdrawals by Texaco within thirty days. The term of the contract is for a period of twenty years.

Texaco will deliver the gas to Transco at a point in the South Clara Driscoll Field, Nueces County, Texas, or at the tailgate of Texaco's Paradis Gasoline Plant, St. Charles Parish, Louisiana, or at such other point or points in Texas or Louisiana as may be mutually agreeable. Transco, however, shall never be obligated to receive at the Texas delivery points a total daily volume in excess of 10,000 Mcf.

The contract sets forth the fact that the parties recognize that the Texaco gas will be commingled in Transco's

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[1] "R." references are to the Joint Appendix in the Court of Appeals filed in this Court with the petition for certiorari to review the Court of Appeals decision.

pipeline system with gas received from other sources and that the specific gas delivered by Texaco to Transco cannot be redelivered to Texaco. Hence, the contract contains provisions respecting the quality of the gas to be delivered by both parties. The gas delivered by Transco to Texaco must be odorized.

The rates to be charged by Transco are 22¢ per Mcf for the interruptible deliveries and 22.04¢ per Mcf for the firm deliveries.

In lieu of a dedication of reserves for the firm deliveries, Texaco warrants that it will maintain natural gas reserves to insure the availability for deliverey of 8,000 Mcf per day for a period of twenty years. This warranty does not apply to the interruptible deliveries.

In the application, Transco also sought authority to construct and operate certain gathering, pipeline, compressor and metering facilities.

Texaco filed no application but participated as an intervenor in support of Transco.

Petitioner, in whose franchised territory Texaco's Eagle Point Refinery is located, filed a petition to intervene in opposition to Transco's application. Six other distribution companies likewise filed petitions to intervene in opposition.[2] The Board of Public Utility Commissioners of the

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[2] South Jersey Gas Company (South Jersey); Elizabethtown Consolidated Gas Company (Elizabethtown Consolidated); City Gas Company of New Jersey (City Gas); Philadelphia Electric Company (Philadelphia Electric); Philadelphia Gas Works Division of the United Gas Improvement Company (Philadelphia Gas Works); New Jersey Natural Gas Company (New Jersey Natural). All of these intervenors, including Public Service, are customers of Transco except New Jersey Natural which is a customer of South Jersey.

State of New Jersey filed a Notice of Intervention and opposed the certificate application. All petitions to intervene were granted by Order dated October 29, 1963.

The Commission ordered a hearing which was convened on October 29, 1963 and was concluded on January 29, 1964, after eight nonconsecutive hearing days. Evidence was presented by Transco and Texaco in support of the application. The distribution company intervenors presented evidence in opposition.

The Presiding Examiner issued an Initial Decision on June 5, 1964, in which he recommended the issuance of a certificate, for the most part as requested by Transco (R. 167-237). The Commission's Order of August 25, 1964, granted the motion of the distribution company intervenors requesting oral argument on their exceptions to the Examiner's Initial Decision (R. 250). In that Order the Commission, *sua sponte*, raised the following issue: "(5) Whether the arrangement between Texaco and Transco involves a sale of gas by Texaco to Transco for resale by the latter so that the producer should be required to secure a certificate." The Commission, after oral argument held October 20, 1964, decided against jurisdiction, adopted the Examiner's Decision, and by its Orders of February 17, 1965 (R. 271-281) and April 16, 1965 (R. 299-304), issued a certificate of public convenience and necessity to Transco.

Review was sought by Petitioner in the United States Court of Appeals for the Third Circuit. The Court below affirmed the Commission's orders. It declined to adopt the commingling or molecular theory as controlling on the issue of jurisdiction and held that jurisdiction in *Lo-Vaca* and *Amerada* was sustained on facts not present in this case.[3]

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[3] *California* v. *Lo-Vaca Gathering Co.*, 379 U. S. 366 (1965); *F. P. C.* v. *Amerada Petroleum Corp.*, 379 U. S. 687 (1965).

The Court likewise rejected Petitioner's contention that the exchange of gas between Texaco and Transco was in reality a sale and thus Commission jurisdiction should be asserted. Instead the Court said, the exchange should be viewed as a bailment. The Court denied that the transportation by Texaco of the gas in its pipeline for approximately four miles over public and private lands is a "transportation of natural gas" within the meaning of Section 1(b) of the Act because it viewed Texaco's pipeline as a plant facility. Finally, the Court rejected what it termed "Challenge To Findings Of Fact" stating that the Commission had given careful consideration to all the factors bearing on the public interest. However, it did not delineate the basis for such conclusion.

Reasons for Granting the Writ

A. The commingling or molecular doctrine alone supports jurisdiction.

This case presents the issue as to whether in spite of original commingling of gas there might be a separate so-called nonjurisdictional transaction of a precise amount of gas not-for-resale within the meaning of the Natural Gas Act. This Court expressly stated that this issue need not be reached in the *Lo-Vaca* and *Amerada* cases; *California* v. *Lo-Vaca Gathering Co.*, 379 U. S. 366 (1965): *F. P. C.* v. *Amerada Petroleum Corp.*, 379 U. S. 687 (1965). In those cases the Commission successfully contended that the jurisdictional status of a sale was governed by the physical facts of the flow of gas and not by the bare recitals of contract. The Commission *asserted* jurisdiction in those cases, and, thus, this Court in *Lo-Vaca* at page 370 said:

> "* * * Whether cases could be conjured up where in spite of original commingling there might be a sep-

arate so-called non-jurisdictional transaction[3] of a precise amount of gas not-for-resale[4] within the meaning of the Act is a question we need not reach."

"[3] Our reference in *Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1, 4, to 'direct' sales of gas to industrial users as non-jurisdictional sales is not dispositive of the present issue. For the Commission had refused a certificate for transportation of the gas because from the standpoint of conservation it considered the end use as boiler fuel to be inferior. Whether the Commission had authority to assert jurisdiction over the so-called 'direct' sale because it was 'for resale' as a result of its commingling with other gas was not in issue.

"[4] *Cf. United States* v. *Public Utilities Comm'n*, 345 U. S. 295, 317-318; *City of Hastings* v. *Federal Power Comm'n*, 221 F. 2d 31."

To the same effect was the Court's statement in *Amerada*:

"* * * Thus, here, as in *Lo-Vaca*, we need not and do not reach the issue of whether 'in spite of original commingling there might be a separate so-called nonjurisdictional transaction of a precise amount of gas * * *' 379 U. S., at 691."

However, in this case, the Commission *disclaimed* jurisdiction and held that the commingling of natural gas with admittedly jurisdictional gas for resale did not compel Commission jurisdiction over the whole. It said:

"We conclude that the mere physical commingling of Texaco's gas in Transco's lines with gas Transco has purchased for subsequent resale does not compel rejection of historic notions of bailments

and require us to transform the transportation agreement into a succession of sales, by Texaco to Transco and again by Transco to Texaco. * * *" (R. 279).

The Court below also rejected the molecular theory and held that the physical commingling of Texaco's gas in Transco's lines with gas Transco has purchased for subsequent resale involved nothing more than a bailment of a fungible commodity and thus was not a jurisdictional transaction.

This decision clearly created a regulatory gap. Such a "gap" is directly opposed to the intent of Congress in enacting the Natural Gas Act. In the X-20 case, *F. P. C. v. Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1, this Court said at page 28, "* * * Congress did not desire an 'attractive gap' in its regulatory scheme * * *" and that it "* * * intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable natural resource. * * *" Despite the clear mandate from this Court defining the Congressional intent, the Court below upheld the Commission's creation of a regulatory gap and held that the doctrine of commingling as applied in *Lo-Vaca* and *Amerada* has no application here because of the absence of "a jurisdictional sale for either consumption or resale".

The Commission, using this decision as a springboard, has already decided to "widen" the gap and in its recent Opinion No. 516, *Florida Gas Transmission Company*, Docket No. CP65-393, issued March 1, 1967, —— F. P. C. ——, held that even where there is a sale of natural gas in the field by a producer to an electric generating company, to be transported in interstate commerce by a natural gas pipeline company, that it does not have jurisdiction over the sale in the field.

Thus, it is plain, a grave federal question is raised by the decision below as to the scope of the statutory jurisdiction of the Federal Power Commission in its administration of the certificate provisions of the Natural Gas Act.

This jurisdictional issue should be resolved by this Court because the Court below, in refusing to apply the commingling doctrine, relied on the fact that this Court expressly stated that it need not reach the question of whether commingling alone is sufficient to invoke jurisdiction in either *Lo-Vaca* or *Amerada*. The Court below, as we have noted, held that these cases had no application because of the absence of a jurisdictional sale for either consumption or resale. Further, the Court below concluded that the arrangement was not devised to avoid jurisdiction and that it involved nothing more than the bailment of a fungible commodity. We respectfully contend that the Court below erred in holding that the commingling doctrine is non-applicable.

The jurisdictional determination in the present proceeding will create a class of transactions which will be free from effective regulation. It provides an escape from the comprehensive regulatory scheme Congress established for the protection of natural gas consumers. This Court made it clear that the Commission must resolve jurisdictional issues with a view to the substance, not merely the form of a gas sale transaction, *California* v. *Lo-Vaca Gathering Co.*, 379 U. S. 366 (1965). In that case, this Court recognized that the purportedly nonjurisdictional gas would be commingled in the transmission pipeline with gas destined for jurisdictional markets. Therefore, it adopted the rule of molecular flow and held that the Commission's jurisdiction was tied to the physical realities of gas flow rather than to contractual stipulations of the parties. This was

a reapproval of the jurisdictional test formulated in the earlier decision in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515 (1945), wherein it was held that jurisdiction should follow the flow of electric energy which provided an engineering and scientific test rather than a legalistic or governmental test. This holding was also emphasized in the *Colton* case, a case wherein this Court noted the similarities of Sections 201(b) of the Federal Power Act and Section 1(b) of the Natural Gas Act in reaching its determination upholding jurisdiction, *F. P. C.* v. *Southern California Edison Co.*, 376 U. S. 205, 209, n5 (1964).

It is evident that the Court below seemed to place some reliance on its interpretation of the intent of the parties in entering this type of a transaction for it said, "Further, the arrangement between Texaco and Transcon was not devised to avoid regulation; * * *". Petitioner contends that this is irrelevant. The end result is that Texaco avoids jurisdiction completely. In *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U. S. 392 (1965) at page 400, this Court in upholding jurisdiction said:

> "Without impugning in any way the good faith and genuineness of the transactions, we think it clear that the lease-sales here in question can nonetheless be considered 'sales' of natural gas * * *."

Again, in *California* v. *Lo-Vaca Gathering Co.*, this Court upheld jurisdiction even though Justice Harlan pointed out in his dissent that the good faith of the parties to the litigation has not been impugned in any way (366 U. S. 377). Thus, the end result of the avoidance of regulation transcends the question of whether or not the parties deliberately intended to avoid regulation.

The decision of the Court below is in direct conflict with the decision of the United States Court of Appeals for the

Fifth Circuit in *Louisiana Public Service Commission* v. *F. P. C.*, 359 F. 2d 525 (1966). In that case United Gas Pipeline Company mixed natural gas in its pipeline and sold some of the gas at wholesale in Louisiana where the gas was produced and also sold some of the gas in other states. The Court held that the *Lo-Vaca and Amerada*[4] decisions clearly held that the mixing of intrastate gas with a substantial portion of interstate gas for pipeline transportation in one commingled stream gave the Commission jurisdiction "at the outset over the entire transaction".

The Third Circuit did not directly meet the issue of whether "commingling" itself was sufficient to confer jurisdiction on the Commission but did state that the absence of a jurisdictional sale caused it to reject the doctrine of commingling. The inference is that the Court below held that original commingling without more is insufficient to support jurisdiction. This we believe was error. The Court below completely ignored the Supreme Court's admonition in *Lo-Vaca* that if the parties "* * * were free to allocate gas for a particular use, havoc would be raised with the federal regulatory scheme." (379 U. S. 369). Therefore, it is submitted that consumer protection requires that this Court should determine whether commingling or molecular flow itself should be the test to be applied by the Commission in determining its jurisdiction.

B. The Commission should be required to assert its jurisdiction because the exchange transaction is a "sale for resale".

Aside from the issue of whether or not the "Commingmingling Doctrine" in itself supports jurisdiction, this

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[4] *California* v. *Lo-Vaca Gathering Co.*, 379 U. S. 366 (1965); *F. P. C.* v. *Amerada Petroleum Corp.*, 379 U. S. 687 (1965).

case presents the question of whether an exchange of gas should be considered to be a sale or a bailment. It has frequently been held that there is no substantial difference between a sale and an exchange and the legal effect of a contract of exchange is generally the same as that of a contract of sale. In law, an exchange is recognized as two sales. Title is absolutely transferred in both a sale and an exchange (33 C. J. S. §§1(b)).

The Court below held that the instant transaction amounted to nothing more than the bailment of a fungible commodity because a transfer of title was not intended by the parties. Petitioner contends that there was a definite transfer of title based on two undisputed facts, *i.e.*: (1) Article 12 of the contract between Transco and Texaco provided that Transco would assume the risk of loss while the gas was in its possession, and (2) Article 10 of the General Terms and Conditions applicable to all of Transco's filed F. P: C. Rate Schedules set forth in its Gas Tariff provides that:

> "Seller agrees that it will and it hereby does warrant for itself, its successors and assigns, that at the time of delivery it will have good title to all natural gas delivered by it to Buyer, free and clear of all liens, encumbrances and claims whatsoever * * *."

Obviously Transco and Texaco intended that title to the Texaco delivered gas would pass to Transco because the contract states that Texaco will not receive its identical gas and both parties had or should have had knowledge of the terms of the Tariff.[5] Both the Commission and the Court simply ignored Petitioner's argument with respect to the Tariff provision regarding title. We can only con-

[5] Reference is made in the contract to Transco's filed Tariff.

clude from this that, silence gives consent, at least to the conclusion that under Transco's Tariff title necessarily passed.

Thus, with a transfer of title, this exchange should be viewed as a sale and not a bailment. Such a holding is necessary in order to avoid a "regulatory gap" and would be completely consistent with this Court's holding in the *Rayne Field* case, *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U. S. 392 (1965). In *Rayne Field*, Texas Eastern purchased leases of natural gas from producers in Louisiana. A sale of gas in place is not recognized by Louisiana law, so Texas Eastern contended that, as there was no sale of natural gas, the Commission had no jurisdiction. The Commission asserted jurisdiction and said to decide otherwise "would exalt form over substance, would give greater weight to the technicalities of contract draftsmanship than to the achievement of the purposes of the Natural Gas Act, and would impair our ability to control the price received for gas sold to the pipelines in interstate commerce to the detriment of the ultimate consumers", *Texas Eastern Transmission Corp.*, 29 F. P. C. 249, 256.

This Court upheld the Commission and said:

> "Without impugning in any way the good faith and genuineness of the transactions, we think it clear that the lease-sales here in question can nonetheless be considered 'sales' of natural gas in interstate commerce for purposes of the Act. A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law. * * *" (381 U. S. 392, 400).

The Commission and the Court below decided to view the instant transaction as a bailment of fungible goods in or-

der to defeat jurisdiction. Yet, it should be noted that the Commission reverted to its earlier position[6] in the *Sayre Field* case (*Natural Gas Pipeline Co. of America,* Opinion No. 480 (Nov. 8, 1965)), 34 F. P. C. 1258, and held that bailments and fungibility were not pertinent concepts under the Natural Gas Act. The Commission stated:

> "* * * Recognizing that as a matter of contract law the transaction might well be characterized as a bailment for hire, we think it clear that insofar as its status under the Natural Gas Act is concerned, it must be construed as a sale. * * *" (34 F. P. C. 1263).

The Commission further held that the delivery and redelivery of equivalent volumes of natural gas constituted an exchange, and, thus, a sale within the meaning of the Natural Gas Act. The Commission said:

> "* * * The situation here is analogous to the situation where a pipeline takes gas in one part of its line in exchange for a consideration of a promise to provide the seller with an equivalent amount of gas at another point on the pipeline. Such exchanges have always been construed as involving sales and resales of gas. * * *" (34 F. P. C. 1263, 1264).

The complete about-face of the Commission in holding that in this proceeding it would not accept the concept that an exchange amounts to two sales and that it would cling to "historic notions of bailments" (R. 279) and its decision issued less than nine months later in the *Sayre Field* case holding that bailments and fungibility were not pertinent concepts under the Natural Gas Act and construing the

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[6] *Oklahoma Natural Gas Company,* 23 F. P. C. 291; *Shell Oil Company,* 25 F. P. C. 1316.

transaction as an exchange, and therefore a sale, cannot be reconciled. *We can only conclude that the decision in this case was arbitrary and discriminatory.*

The Commission observed that "* * * An essential feature of this transaction is that Texaco is the owner of the gas both at the beginning and the end of its journey from the wellhead to the point of ultimate consumption. * * *" and "* * * it is clear that the intermediate transactions result in returning the gas to the original producer-owner * * *." (R. 279). These statements are inaccurate in the sense that they overlook the fact that there are original sales in the field. For example, Texaco proposes to offer gas to Transco from its Paradis Gasoline plant. At that plant Texaco *purchases gas from other producers.* It is also possible under the contract for Texaco to purchase gas at other points in Louisiana and Texas and offer it for transportation. In addition, there is a sale in the field with respect to the Royalty Owners whose 1/8th interests in the gas must be purchased and paid for by Texaco when it delivers the gas to Transco. This sale transfers title to at least 1/8th of the gas to Texaco and Transco will not return any gas to the original Royalty Owners.

C. The continuous transportation of natural gas flowing in interstate commerce by Texaco from the point of delivery in New Jersey by Transco for approximately 4½ miles is a "transportation of natural gas" within the meaning of Section 1(b) of the Natural Gas Act.

We contend that the continuous transportation of the gas by Texaco is as much a jurisdictional transportation as Transco's transportation and that the Commission and the Court below erred in waiving the certificate requirement. The Texaco pipeline traverses streets and highways and is, for the most part, located on public and private property rather than on Texaco's refinery property. The

gas will be transported by Texaco at high pressures up to 250 lbs. for a distance of approximately four and one-half miles. Despite these facts the Commission held, and the Court agreed, that the Texaco pipeline was a "plant facility." The Court held that interstate commerce ceased when the transported gas was delivered to Texaco. It is our contention that the landmark case of *Federal Power Commission* v. *East Ohio Gas Co., et al.*, 338 U. S. 464 (1950), controls the point. As noted in the *East Ohio* case, the word "transportation" in Section 1(b) of the Act is not limited to companies which both transport natural gas in interstate commerce and sell it for resale. It applies to the *movement of interstate gas* in East Ohio's high pressure pipelines (338 U. S. 46). The *movement of the Transco interstate gas* does not cease upon delivery to Texaco at Transco's main pipeline but continues to move at high pressures until it reaches the refinery. It is only at that point that *the movement of interstate gas* can be held to have ceased.

In the *East Ohio* case this Court said:

> "* * * As we pointed out in *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U. S. 507, 516 §1(b) made the Natural Gas Act applicable to three separate things: '(1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.' And throughout the Act 'transportation' and 'sale' are viewed as separate subjects of regulation. They have independent and equally important places in the Act. Thus, to adopt respondents' construction would unduly restrict the Commission's power to carry out one of the major policies of the Act. Moreover, the initial interest of Congress in regulation of transportation facilities was reemphasized

> in 1942 by passage of an amendment to §7(c) of the Act broadening the Commission's powers over the construction or extension of pipe lines, 56 Stat. 83. This amendment followed a report of the Commission to Congress pointing out that without amendment the Act vested the Commission with inadequate power to make 'any serious effort to control the unplanned construction of natural-gas pipe lines with a view to conserving one of the country's valuable but exhaustible energy resources.' We hold that the word 'transportation' like the phrase 'interstate commerce' aptly describes the movements of gas in East Ohio's high-pressure pipe lines." (338 U. S. 468-469).

It seems apparent that neither the Commission nor the Court below considered the important distinction this Court recognized in the *East Ohio* case when it referred to the fact that the word "transportation", like the phrase "interstate commerce", describes *the movement of* gas in high pressure pipelines. Thus, to hold that "interstate commerce" ceased upon the delivery to Texaco, as the Court below did, is an interpretation of Section 1(b) of the Act that is too restrictive because it overlooks the fact that *the movement of interstate gas* continued in Texaco's high pressure pipeline.

The Commission, by refusing to assert its jurisdiction over the transportation in the State of New Jersey, has voluntarily created a regulatory gap which it usually deplores. It is unrealistic to expect that this gap in interstate transportation regulation will be closed by state action. Hence, the reasoning in *F. P. C.* v. *Transcontinental Gas Pipe Line Corp.* is apposite, 365 U. S. 1. At page 19 the Court said:

> "* * * Therefore, when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. * * *"

D. The Hearing Examiner committed prejudicial error when he used another docket before the Commission as the basis for conclusory findings resulting in the denial of "Fair Administrative Procedure".

After Transco filed its application in this case, designated Docket No. CP63-222, it filed a later application designated Docket No. CP64-96. This later filing was one of its usual annual filings to increase its sales and to seek authority for the construction of additional facilities. It became an uncontested proceeding under the Commission's shortened procedure in which no formal hearing is held. Thus, the Commission was able to issue its certificate in this later docket on April 17, 1964. The Hearing Examiner's decision in this proceeding was not issued until June 5, 1964. The Examiner's use of Docket No. CP64-96 caused him to commit two prejudicial errors in arriving at his decision, which was adopted by the Commission.

In the first error, the Examiner clearly recoginzed that one of the main bases for approval of the application *was the necessary finding that the proposed interruptible service would utilize idle capacity.* The Examiner was unable to make this finding from the evidence of record. Transco had simply failed to offer any evidence upon which the Examiner could make a finding on this crucial issue. He thus erroneously went to the later docket (CP64-96 on which no formal hearing was held) and used untested highly technical data to make his own computations and thus conclude that the necessary valley (idle) capacity existed

on the Transco system. In addition, the Examiner failed to include a significant portion of Transco's contract deliveries and thus his finding was not supported by "substantial evidence".

In his second procedural error, the Examiner preempted facilities from Docket No. CP64-96. He found, as Transco had contended, the cost of facilities herein to be constructed was $4,858,000. The Examiner then found that as the result of the Commission's certification in CP64-96 on April 17, 1964, permitting Transco to increase sales to customers, other than Texaco, that the Commission had somehow authorized sufficient capacity to serve Texaco in that docket, and thus, Transco needed only $600,000 worth of facilities in this proceeding (R. 176-178). This left $4,258,000 of Transco's estimated investment to be charged against Transco's existing customers. Therefore, the showing of economic feasibility is clearly *not* supported by "substantial evidence".

The above procedures used by the Hearing Examiner violate Section 556(d) of the Administrative Procedure Act. This Court has held that findings arrived at in such a manner cannot properly be made the basis of conclusory findings upon which to authorize a certificate (*Atlantic Refining Co.* v. *Pub. Serv. Comm'n*, 360 U. S. 393). The procedures invoked by the Examiner in relying on a separate docket to make his findings, completely deprived Petitioner of its rights to cross-examination and rebuttal on crucial matters subject to argument and capable of rebuttal. This was prejudicial error by the agency and denied a trial type hearing on the merits to Petitioner. The result was a denial of due process.

E. The evidence of record does not substantiate the findings that the present or future convenience and necessity *required* the issuance of the certificate within the meaning of Section 7(e) of the Natural Gas Act.

The Court below held that the Commission had given careful consideration to all the factors bearing on the public interest, but did not independently evaluate the conclusion of the Commission. We contend that the Court unduly restricted its consideration of the public interest factors in view of the Commission's *reversal* of its prior treatment of these same factors.

The decision of the Commission was inconsistent with the principles found by the Commission in the X-20 case and approved by the United States Supreme Court, *F. P. C.* v. *Transcontinental Gas Pipe Line Corp., et al.,* 365 U. S. 1. In the X-20 case, Transco proposed to furnish a similar transportation service for Consolidated Edison Company, one of its existing distribution company customers. Transco proposed to transport Consolidated Edison's gas from Texas to New York at its CD-3 rate, less Transco's average cost of gas. This is the exact same basis on which it would charge Texaco for the firm service proposed herein. Consolidated Edison would have used the gas, not for resale, but as here, in its own plant.

Consolidated Edison had to "offer or pay" for the transportation of 50,000 Mcf per day of its gas for 305 days per year. For the remaining 60 days of the year the transportation would be interrupted and Transco would sell 50,000 Mcf per day to Consolidated Edison for resale —*i.e.*, consumer gas instead of transportation gas.

Thus, it can be seen that Transco was proposing a combined transportation and peaking service, the benefits of which would inure to the customers of Consolidated Edison.

Despite these benefits, the Commission considered it *not in the public interest to certificate* X-20—*a fortiori* it should have denied the application herein because:

In the instant proposal, there is no peaking service. No consumers in the State of New Jersey will benefit by the availability of peaking gas for 60 days out of the year. Transco will not have the guaranteed take-or-pay-for revenues such as it contemplated under X-20 where Consolidated Edison had to "take or pay" for 50,000 Mcf per day for every day in the year for twenty years. There is no evidence that any savings which inure to Texaco will be passed along to gas consumers; whereas, in X-20, any savings by Consolidated Edison would inure to the benefit of its consumers.

Texaco intends to use a portion of the gas to be delivered as boiler fuel. We did not oppose certification on the basis of this end use of gas. However, it was one of the factors the Commission took into consideration in denying certification despite the fact that for 60 days in the winter the transportation of Consolidated Edison's own gas would be interrupted and Consolidated Edison would purchase Transco gas for resale to consumers. This "public interest" plus factor (in the X-20 case) is not present in the instant proposal.

In the light of the Court's holding in the X-20 case, it is not in the public interest for the Commission to unconditionally sanction a transportation arrangement of long term duration. It is patently discriminatory, where the Commission's policy denies an existing distribution company customer the right to make a much more favorable transportation arrangement, from a public interest standpoint, and then to sanction such an arrangement where public benefit was not proven. In sum, it is fair to say that the instant proposal has all of the defects and none of the benefits contained in the X-20 case.

The Commission found, and this Court upheld the finding in the X-20 case, that the proposal and similar proposals could have effects on the operation of pipeline facilities detrimental to the interests of the consumer since such proposed service would involve the preemption of pipeline capacity which would otherwise be available for the use of domestic consumers (365 U. S. pp. 5, 31).

In the present case, Transco not only has been authorized to preempt capacity for Texaco but also to use its "cheap expansibility" to the detriment of its distribution company customers.

The loss of "cheap expansibility" adversely affects Transco's present distribution company customers and should have been recognized by the Commission in determining the public interest. In *City of Pittsburg* v. *F. P. C.*, 237 F. 2d 741 (CADC), the Court reversed the Commission because it failed to consider the issue raised by Pittsburg that conversion of Texas Eastern's Little Inch line would deprive Texas Eastern's existing customers of capacity that could be used for future expansion. The Commission then recognized the validity of a similar contention in the case of *Mid-America Pipeline Company* v. *F. P. C., et al.*, 330 F. 2d 226 (CADC), and provided for a reduction in rates to compensate presently for a loss of cheap expansibility. In this case the Commission merely ignored this issue and made no attempt to compensate for the loss. Yet, it was even more important here that the Commission consider a *present* compensation for the loss of cheap expansibility because the Commission, contrary to its holding, does not have full jurisdiction over the transaction proposed by Transco because it does not have jurisdiction over the rate. Future protection cannot be assured by way of relative adjustment in Transco's rate or terms of service in a future rate proceeding (*United*

Gas Pipe Line Co. v. *Mobile Gas Serv. Corp.*, 350 U. S. 332; *F. P. C.* v. *Sierra Pacific Power Co.*, 350 U. S. 348 (1956)).

Because of the fact that Transco will not be able to unilaterally change the terms and conditions of the contract rate for the interruptible service and because of our belief that the terms of the agreement between Transco and Texaco are discriminatory as to Transco's existing customers, we contend that the Commission erred in finding that there was no need to make a careful scrutiny of the proposed rates and decide this issue, *ab initio*. *United Gas Co.* v. *Mobil Gas Serv. Corp.*, 350 U. S. 332. Where as here, unusual circumstances exist, the Commission should conduct a careful examination into rates. *Texas Eastern Transmission Corp.*, 24 F. P. C. 364, 394, *aff'd. sub nom; Ohio Fuel Gas Co.* v. *F. P. C.*, 296 F. 2d 594 (CADC).

There is no readily apparent basis for the Commission's reversal of its carefully considered policy determination in the X-20 case. Especially is this so in light of the fact that this case was given full consideration by this Court and this Court approved the Commission's findings and holdings in all respects.

The decision below, with respect to the other public interest specific findings, briefly referred to by the Court at 371 F. 2d 6 as having been decided on "careful consideration" by the Commission, is erroneous. Petitioner desires to reserve argument on these points for discussion on the merits in the event *certiorari* is granted.

F. Effect of decision below upon the administration of the Natural Gas Act and the gas industry.

This request for review presents several publicly important questions of interpretation of the Natural Gas Act calling for delineation by this Court of the statutory jurisdiction of the Commission. The decision below raises

the issue of whether *commingling alone* is a basis for jurisdiction. This issue has not heretofore been determined by this Court, *but should be,* because of the reluctance of the Appellate Court to apply the doctrine in this case. As a result, the Commission has read the Appellate Court's decision in this case as holding that *commingling is irrelevant* and thus it refused to assert jurisdiction over a sale in the field in *Florida Gas Transmission Company,* Docket No. CP65-393, Opinion No. 516, issued March 1, 1967 (slip opinion page 18). It is plain to all in the industry that the Commission's holding in this Transco-Texaco case and the extension of that holding to the *Florida Gas* case has opened up a "regulatory gap" which heretofore had been considered closed by a line of applicable decisions in this Court. In our opinion, the decision in the instant case is in conflict with the line of jurisdictional cases commencing with *Connecticut Light & Power Co.* v. *F. P. C.,* 324 U. S. 515 (1945) and continuing on through *Colton, Rayne Field, Lo-Vaca* and *Amerada.* The public interest issues decided below are in conflict with the decisions of this Court in *Catco* and X-20. The abnegation by the Commission of its jurisdiction in this case, as well as in the *Florida Gas* case, comes at a particularly unfortunate time because of the great concern of Federal, State and Municipal agencies with respect to abatement of air pollution. It is almost inevitable, with the continuance of the regulatory gap created herein, that pressures calling for the greater utilization of natural gas by large users of fossil fuel will result in higher prices to consumers. The possibility of a substantial unregulated market for the benefit of particular producers which would raise havoc with the regulatory scheme was clearly foreseen and foreclosed by this Court in *Lo-Vaca.* The possible creation of another substantial unregulated market is an issue that is squarely raised in the instant case. There are 14 major refineries on the

East Coast alone. Obviously, pipelines could create a substantial unregulated market by transporting gas to the refineries throughout the United States if the present decision is allowed to stand as a precedent. The Commission, by extending its denial of jurisdiction herein to the *Florida Gas* case, has created a tremendous unregulated market for the use of gas by electric generating utility companies. Having sanctioned the unregulated purchase and use of gas by Florida Power and Light Co., how can the Commission deny the many requests of the same general character that the Commission will receive for like service to other electric generating utility companies? And granting certification to pipelines to serve electric generating companies, what "fair or rational" basis, to use the Commission's own X-20 words, will the Commission have to deny large industrial users who will purchase their own gas in the field? The *expanding* regulatory gap which the Commission is now creating will inevitably result in higher prices for consumers.

An equally compelling reason for the granting of review in this case is the uncertainty with which the gas industry must contend because of the decision of the Court below. Does it mean that utility and industrial companies are free to exploit this regulatory gap by purchasing *gas in place* under this decision? Or is it only necessary to purchase the *gas in the field* under the Commission's extension of this case to its *Florida Gas* decision? On the other hand, the doctrine of commingling in the *Lo-Vaca* case may eventually be decided to be controlling by this Court. The observation of Justice Harlan in the *Lo-Vaca* case that the gas industry is entitled to know the fundamental ground rules by which it should conduct itself in this regard with some degree of predictability is clearly pertinent in view of the present confusion in the law (379 U. S. 376). How can the industry rely on Commission ac-

tion when the ground rules change with every case? For example, two of the basic reasons the Commission stated it relied on in denying certification to Consolidated Edison in X-20, in its own words were:

> "Certainly, if we were to grant this request we would soon be confronted with many requests of the same general character; and granting the X-20 proposal, we would have no fair or rational basis for denying similar such requests. Likewise, the authorization of this and like proposals would pre-empt for this usage capacity which would otherwise be available to meet more urgent and widely beneficial public needs, * * *" (21 FPC 141).

This rationale of the Commission, approved on review by this Court, apparently was no more than a whim, for the Commission completely disregarded these two cogent reasons for denial in *granting* certification in this case. Even while preparing this petition for certiorari, we find the Commission making another about-face and declaring that this case is a binding precedent compelling it to grant certification in the *Florida Gas* case. The Commission said:

> "We see no rational way to hold that commingling is irrelevant in Texaco-Transco and, at the same time find it fully controlling here. To make such a distinction would be to concede that form, not substance, controls us." (slip opinion p. 18)

The Commission's reasoning in X-20, *this case* (Transco-Texaco), and *Florida Gas* is indeed curious. In X-20 it places *great stress* on the importance of decisional precedence. In the instant case *no weight* is given to the argued precedential weight of this case for the future. In *Florida Gas*, the precedential value of the instant (Transco-Texaco)

case is of *compelling importance,* a surprising result in view of the fact that the Hearing Examiner considered he was confining his decision to the narrow limits of the facts in this case. In his view, this case was to be almost *sui generis* (R. 226-231). Commisisoner Ross, *who wrote the opinion for the Commission,* has now amplified his intent in this case by his dissent in *Florida Gas Transmission Co.*, Docket No. CP65-393, March 1, 1967. He stated at slip opinion, dissent p. 9, that Transco-Texaco (this case) was to be "a very narrow exception" to *Lo-Vaca.* It is evident that Commissioner Ross has now become somewhat disenchanted with his own opinion herein because at slip opinion, dissent p. 10, he states "* * * In view of the majority's holding today, I am now far from certain that reasonable exceptions can long remain exceptions." (*Florida Gas, supra*).

CONCLUSION

This case presents issues upon which the gas industry needs guidance and consumers need protection. The Court below, though holding against Petitioner on all issues, did concede that "the questions raised are not entirely free from difficulty" (370 F. 2d 3). For all the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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WILLIAM H. BLAKE,
J. HARRY MULHERN,
Of Counsel.

Dated: April 17, 1967

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15423

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

TEXACO, INC. AND TRANSCONTINENTAL GAS
PIPE LINE CORPORATION,
Intervenors.

ON PETITION TO REVIEW ORDERS OF THE FEDERAL
POWER COMMISSION

Before HASTIE AND SMITH, *Circuit Judges,* and KIRKPATRICK, *District Judge.*

Argued February 25, 1966

Opinion of the Court

(Filed January 18, 1967)

By SMITH, *Circuit Judge.*

This matter is before the Court on a petition to review the action of the Federal Power Commission in granting

a certificate of public convenience and necessity to Transcontinental Gas Pipe Line Corporation (Transcon) under §§ 7(c) and (e) of the Natural Gas Act as amended, 15 U.S.C.A. §§ 717f (c) and (e). The petitioner assigns as error not only the granting of the said certificate but also the Commission's disclaimer of jurisdiction over Texaco, Inc., (Texaco). The questions raised are not entirely free from difficulty. It should be noted that the position of the petitioner is supported by six utility companies, granted leave to appear amicus curiae.

Relationship of Parties

Transcon is a "natural-gas company" within the meaning of § 2(6) of the Act, 15 U.S.C.A. § 717a(6), and as such is engaged in the transportation of natural gas in interstate commerce. It maintains transmission lines which extend from the Gulf Coast area of Texas and Louisiana to a terminus in New York. Texaco is a producer of natural gas and the owner of reserves located in the said area and in close proximity to Transcon's lines. It is also the owner and operator of an oil refinery in West Deptford, New Jersey, in close proximity to Transcon's lines. Public Service Electric and Gas Company (Public Service), a contract customer of Transcon, is a public utility engaged in the distribution and sale of natural gas. Its service territory includes West Deptford.

The primary interest of Public Service is in the alleged intrusion of Transcon into its territory and the possible loss of Texaco as a contract customer. The only interest of the other utility companies is the precedent allegedly established by the Commission's action and its possible impact on their future operations. Their common concern is economically motivated.

Appendix A

Facts

Contemplating a conversion of its refinery operations so as to permit the utilization of natural gas instead of oil as to an industrial fuel, Texaco entered into a contract with Transcon pursuant to the terms of which the latter agreed to transport natural gas owned by the former from mutually acceptable points in Texas and Louisiana to a point approximately four miles from the former's refinery in New Jersey. At this point Texaco would accept delivery and then tarnsport the gas through its own pipeline to its plant facility. Transcon agreed to bear the risk of loss while the gas was in its possession in transit, except for loss due to force majeure as defined by the contract. The proposed transportation service was made subject to such authorizations as were required by applicable law, including the Natural Gas Act.

Under the terms of the contract Texaco would make available to Transcon at the delivery points up to 8000 MCF (thousand cubic feet) per day for firm transportation and up to 16,000 MCF per day for interruptible transportation. However, Transcon would not be required to receive at the Texas delivery point a daily volume in excess of 10,000 MCF. It was contemplated by the parties, and their contract in effect so provided, that daily deliveries by Texaco at the said points would approximate daily redeliveries by Transcon at the specified point in New Jersey, operating conditions permitting. The proposed rate for the transportation of gas on an interruptible basis was 22 cents per MCF, the same rate charged to Sun Oil Company for a similar service. Since no issue is here made as to the rate for the transportation of gas on a firm basis it becomes irrelevant.

Appendix A

It was recognized by the parties, and their contract so provided, "that the natural gas delivered by Texaco for transportation . . . [would] necessarily be commingled in Transcon's pipeline system with gas received from other sources, and that the specific gas delivered to Transcon by Texaco [could not] be redelivered to Texaco." It was further agreed that gas redelivered by Transcon would be of merchantable quality and comparable to the gas delivered by Texaco to Transcon in the field.

Pursuant to the applicable provisions of the Act, Transcon made application to the Commission for authority to construct, install and operate additional pipelines, facilities and equipment necessary to the performance of the proposed transportation service covered by the contract. After extensive hearings the certificate of public convenience and necessity here in question was granted. Texaco filed no application and the failure of the Commission to require it to do os is a principal issue in this case.

Nature of Transaction

The first question for decision is whether Texaco was required by §7(c) of the Act, 15 U.S.C.A. 717f(c), to obtain a certificate of public convenience and necessity. The answer depends upon the nature of the transaction. If the contract is construed as contemplating a "sale in interstate commerce of natural gas for resale" within the meaning of §1(b) of the Act, 15 U.S.C.A. §717(b), then such a certificate was required. If the contract is construed as covering nothing more than a conventional arrangement for the transportation of natural gas for hire then the only aspect of the transaction subject to the Commission's jurisdiction was the transportation. The latter construction, adopted by the Commission, is here challenged as erroneous.

Appendix A

The parties to his proceeding admit that in the transportation operations gas delivered by Texaco to Transcon in the field would be commingled with gas purchased by Transcon for subsequent resale. The petitioner maintains that under these circumstances the arrangement between Texaco and Transcon would involve an exchange of gas made available by Texaco in the field for commingled gas ultimately redelivered by Transcon at West Deptford. With this as a premise it argues that the arrangement must be treated as involving a sale of gas in interestate commerce for resale, subject to the jurisdiction of the Commission. We do not agree. An essential ingredient of an exchange is a transfer of title, and this was clearly not intended by the parties. The arrangement between Texaco and Transcon would involve nothing more than the bailment of a fungible commodity. BROWN ON PERSONAL PROPERTY, 2d Ed. §78; 8 AM. JUR. 2d Ed., BAILMENTS, §40.

The argument advanced by the petitioner was answered by the Commission as follows:

> "We conclude that the mere physical commingling of Texaco's gas in Transco's lines with gas Transco has purchased for subsequent resale does not compel rejection of historic notions of bailments and require us to transform the transportation agreement into a succession of sales, by Texaco to Transco and again by Transco to Texaco. An essential feature of this transaction is that Texaco is the owner of the gas both at the beginning and the end of its journey from the wellhead to the point of ultimate consumption. It has merely contracted for conventional transportation arrangement subject to the Commission's jurisdiction."

The Commission went on to hold that under the circumstances Texaco's proposed operations were not subject to regulation.

The petitioner concedes that the contract is silent as to the transfer of title but contends that an intent to transfer title should be inferred from Transcon's agreement to assume the risk of loss while the gas was in its possession in transit. We find the contention to be without merit. Transcon contracted to furnish a conventional transportation service and the liability it agreed to assume was similar to that ordinarily imposed on the carrier of goods at common law. See *Commodity Credit Corporation* v. *Norton*, 167 F. 2d 161, 164 (3rd Cir. 1948); *United States* v. *Mississippi Valley Barge Line Co.*, 285 F. 2d 381, 388 (8th Cir. 1960); *L. E. Whitlock Truck Service, Inc.* v. *Regal Drilling Co.*, 333 F. 2d 488, 491 (10th Cir. 1964). A transfer of title is clearly not essential to the contractual assumption of this type of liability.

It seems to us that the petitioner's reliance on *California* v. *Lo-Vaca Co.*, 379 U. S. 366 (1965) is misplaced. Therein a producer of natural gas, having adequate resources in Texas, entered into two contracts with an interstate pipeline company engaged in the transportation and sale of gas in interstate commerce. The first of these provided for the sale of gas for subsequent industrial use in facilities maintained by the purchaser in Texas. The second provided for the sale of gas for subsequent industrial use in facilities maintained by the purchaser in New Mexico and Arizona, a transaction clearly subject to Commission jurisdiction under § 7(c) of the Act, *supra*. Pursuant to the terms of these contracts delivery was to be made to a subsidiary of the purchaser at a point in Texas. It was

understood by the parties that the gas purchased under these contracts would flow in a commingled stream with gas from other sources, a substantial portion of which would be resold in interstate commerce. The parties attempted by their contracts to evade Commission jurisdiction. The Court, affirming the decision and order of the Commission, applied the doctrine of commingling and held that the entire transaction was subject to jurisdiction. On facts similar to those in *Lo-Vaca*, the Court reached the same conclusion in *Federal Power Commission* v. *Amerada Petroleum Corp.*, 379 U. S. 687 (1965). The question here raised by the petitioner was not reached by the Court in either of the cited cases.

The claim to Commission jurisdiction in *Lo-Vaca* and *Amerada* was sustained on facts which are not present in the case now before us. Texaco is the producer and owner of gas which it proposed to use as an industrial fuel in its refinery at West Deptford. It contracted with Transcon for conventional transportation service for which the latter was to receive a fixed charge per MCF of gas transported. The arrangement would not involve either a sale by Texaco to Transcon or a resale by Transcon to Texaco. The expected commingling of gas owned by Texaco with gas purchased by Transcon for resale would not alter the substance of the transaction. We are of the opinion that under these circumstances the doctrine of commingling, as applied in *Lo-Vaca* and *Amerada*, has no application in the instant case because of the absence of a jurisdictional sale for either consumption or resale. Further, the arrangement between Texaco and Transcon was not devised to avoid regulation; in fact, the transaction was cast in a form which made it subject to the jurisdiction which the Commission properly assumed.

Appendix A

Continuity of Interstate Commerce

It is agreed that performance of the contract by Transcon would require redelivery of transported gas to a Texaco owned pipeline, a terminus of which is located approximately four miles from the refinery. Texaco would accept redelivery at the terminus and then transport the gas in its own pipelines to the refinery. The petitioner here argues, as it did before the Commission, that this transportation by Texaco would be "transportation . . . in interstate commerce," within the meaning of § 1(b) of the Act, 15 U.S.C.A. 717(b), for which a certificate of public convenience and necessity should have been required. In support of its argument the petitioner cites *Federal Power Commission* v. *East Ohio Gas Company,* 338 U. S. 464, which we believe to be distinguishable on its facts from the instant case.

The Commission, adopting the position taken by the Examiner on the issue, held that Texaco's pipeline was an integral part of its plant facility and that interstate commerce ceased when the transported gas was redelivered at the terminus. The Commission decided that under these circumstances a certificate of public convenience and necessity should not be required. This decision, with which we agree, is in accord with three earlier Commission decisions. *Anchor Hocking Glass Corp.,* 2 F. P. C. 930; *Jersey Central Power and Light Co.,* 9 F. P. C. 717; *Montana Power Co.,* 10 F. P. C. 950.

Challenge to Findings of Fact

The Examiner filed an initial decision in which he reviewed the evidence and summarized in detail the findings of fact upon which his ultimate conclusion to grant the

certificate rested. The decision "with respect to the public interest aspects of the application" was adopted by the Commission and exceptions thereto were denied. On a joint petition for rehearing filed by Public Service and the intervening utilities the objections to the Commission's order were considered and the petition was denied.

The petitioner challenges as erroneous specific findings relating to: the relationship of end use to the public interest; the preemption of available pipeline capacity; the alleged loss of cheap expansibility; the availability of valley capacity; the need by Texaco and the economic advantage to it of the proposed service; and, the settlement proposal submitted by Public Service. Although these findings are subject to review, they are conclusive if supported by "substantial evidence." § 19(b) of the Act, 15 U.S.C.A. § 717r(b); *Shell Oil Company* v. *Federal Power Commission*, 334 F. 2d 1002, 1012 (3rd Cir. 1964).

The administration of the Natural Gas Act has been entrusted to the Commission. We must therefore bear in mind the comprehensive authority vested in the Commission and the statutory limitation on the scope of review. It is the function of the Commission to evaluate the evidence, find the facts, and draw the inferences of which the relevant evidence is reasonably susceptible. But its function does not end there. It must bring to bear an expert judgment and determine "from its analysis of the total situation on which side of the controversy the public interest lies." *Federal Power Commission* v. *Transcontinental Gas Corp.*, 365 U. S. 1, 7 (1964). The Commission may exercise a veto power over proposed transportation but can do so only when a balance of all the circumstances weighs against certification. *Ibid.*, 17. It is the limited

function of the Court to determine whether, on a consideration of the record as a whole, the findings of fact are supported by "substantial evidence."

We have examined the record in its entirety and are convinced by our examination that the challenged findings of fact are based upon a thoughtful consideration of the evidence as a whole and a discriminating evaluation of competing factors. The decision of the Commission and its opinion on the petition for rehearing clearly indicate that careful consideration was given to all the factors bearing on the public interest.

The petitioners have advanced several arguments which we have not discussed. However, we have considered them and find them lacking in substantial merit.

The decision and order of the Commission will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,423

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent,

TEXACO, INC. and TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Intervenors.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Present:

HASTIE and SMITH, *Circuit Judges*, and KIRKPATRICK, *District Judge*.

Judgment

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decision of February 17,

1965 and the order of April 16, 1965 of the Federal Power Commission in this case be, and the same are hereby affirmed.

ATTEST:

THOMAS F. QUINN
Clerk

March 2, 1967

APPENDIX B

Natural Gas Act

Sec. 1 (b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717 (b)]

Sec. 7 (c) [2]No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will

be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. §717f (c)][5]

Sec. 7 (e) [5] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commis-

sion thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (e)]

Sec. 19 (b) [9] Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States[10] for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the

Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

Administrative Procedure Act

§ 556. *Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision*

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the

agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

IN THE

Supreme Court of the United States

October Term, 1968.

No. ~~1081.~~ 93

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, TRANSCONTINENTAL GAS PIPE LINE CORPORATION and TEXACO INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICI CURIAE OF NORTHWEST JERSEY NATURAL GAS, INC., ELIZABETHTOWN CONSOLIDATED GAS COMPANY, NEW JERSEY NATURAL GAS COMPANY, SOUTH JERSEY GAS COMPANY, PHILADELPHIA GAS WORKS, PHILADELPHIA ELECTRIC COMPANY, LONG ISLAND LIGHTING COMPANY, AND THE BOARD OF PUBLIC UTILITY COMMISSIONERS OF NEW JERSEY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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IN THE

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OCTOBER TERM, 1966.

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Northwest Jersey Natural Gas, Inc., Elizabethtown Consolidated Gas Company, New Jersey Natural Gas Company, South Jersey Gas Company, The Philadelphia Gas Works, Philadelphia Electric Company, Long Island Lighting Company and The Board of Public Utility Commissioners of New Jersey respectfully move for leave to file the accompanying brief *amici curiae* in support of the Petition for a Writ of Certiorari of Public Service Electric and Gas Company. The consent of Petitioner has been obtained. The consent of Respondents Transcontinental Gas Pipe Line Corporation and Texaco Inc. has been requested but has not been granted. The consent of the Federal Power Commission has been requested, but has been neither granted nor withheld.

Seven of the movants are public utility companies which, among other things, own and operate retail gas distribution systems for sale of gas to the consuming public. The Board of Public Utility Commissioners is a state agency having regulatory jurisdiction over public utilities in the State of New Jersey, including retail gas distribution companies.

City Gas Company of New Jersey was an intervenor before the Federal Power Commission in these matters Effective September 30, 1965, City Gas Company of New

Jersey became consolidated with City Gas Company of Phillipsburg, New Jersey, and City Gas Company of Newton, New Jersey, under the new corporate name of "Northwest Jersey Natural Gas, Inc." The successor corporation serves consumers in Mercer, Hunterdon, Warren, Morris and Sussex Counties in New Jersey. The successor corporation, like its predecessors, is a public utility under the jurisdiction of the New Jersey Board of Public Utility Commissioners.

Elizabethtown Consolidated Gas Company is a public utility corporation organized under the laws of New Jersey. It distributes natural gas to over 160,000 customers in 21 municipalities in Union and Middlesex Counties, New Jersey.

New Jersey Natural Gas Company is a public utility corporation organized under the laws of New Jersey. It distributes natural gas to some 150,000 customers in that state.

South Jersey Gas Company is a public utility corporation organized under the laws of New Jersey. It distributes natural gas to some 92,400 customers in South Jersey.

Philadelphia Electric Company is a public utility corporation organized under the laws of the Commonwealth of Pennsylvania. It distributes natural gas to some 240,000 customers in Delaware, Chester, Montgomery, Bucks and Lancaster Counties, Pennsylvania.

Under an agreement with the City of Philadelphia, the Philadelphia Gas Works Division of The United Gas Improvement Company (a Pennsylvania corporation) operates the municipally-owned Philadelphia Gas Works and related facilities, distributing natural gas to some 600,000 customers in the City of Philadelphia.

Long Island Lighting Company is a public utility corporation organized under the laws of the State of New York. It distributes natural gas to some 368,000 customers on Long Island, New York, in the Counties of Nassau and

Suffolk and in the Fifth Ward of the Borough of Queens.

All of the above distribution companies (herein called "Distributors") are direct or indirect customers of Transcontinental Gas Pipe Line Corporation (Transco).

These Distributors, together with the Petitioner in this case, are responsible for the bulk of natural gas supplied to retail customers in the State of New Jersey and for substantial amounts of gas supplied in the States of Pennsylvania and New York.

All of the above Distributors, except Long Island, as well as the Board of Public Utility Commissioners of the State of New Jersey, were intervenors in proceedings which culminated in the opinion and order of which review is sought here. The interest of Movants in the grant of certiorari in this case arises from the potential impact of the decision of the Federal Power Commission, affirmed by the Court of Appeals, upon the effective regulation of the field prices charged by producers of natural gas sales in interstate commerce. In particular Movants are concerned with the impact of the transaction certificated by the Commission upon the proper exercise of the Commission's jurisdiction over such field prices in Louisiana and Texas, the major source of supply for pipelines supplying gas to the Distributors.

The proper price at which supplies of natural gas should enter interstate commerce has been, perhaps, the most hotly contested issue under the Natural Gas Act during the past decade. *E.g., Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 378 (*"Catco"*); *Signal Oil & Gas Co. v. FPC*, 238 F. 2d 771 (3rd Cir. 1956), *cert. denied*, 353 U. S. 923 (1957); *UGI v. FPC*, 269 F. 2d 865 (3rd Cir. 1959), *rev'd mem. sub nom. Public Service Comm'n. v. FPC*, 361 U. S. 195; *Public Service Comm'n. v. FPC*, 287 F. 2d 146 (D. C. Cir. 1960), *cert. denied*, 365 U. S. 880; *UGI v. FPC*, 283 F. 2d 817 (9th Cir. 1960), *cert. denied*, 365 U. S. 879.

While these cases dealt with the Commission's statutory duty with regard to the certification under § 7 of the Natural Gas Act of applications by independent producers for certificates, a parallel series of cases has dealt with the Commission's duty when the acquisition of gas involved is in a "nonjurisdictional" posture—as Respondents contend is so in the present case. The Courts have held that jurisdiction over the pipeline gives the Commission authority and duty to inquire into the acquisition of gas. *Public Service Comm'n. v. FPC,* 287 F. 2d 143 (D. C. Cir. 1960) (the "Rayne Field" case); *FPC v. Transcontinental Gas Pipe Line Corp.,* 365 U. S. 1 (the "X-20" case).

In other analogous cases, the Commission has found it necessary to exercise jurisdiction over certain supposedly "nonjurisdictional" transactions—because of the regulatory gaps they presented—and has demonstrated to this Court and the courts of appeals that such regulation is necessary and proper under the Natural Gas Act. *California v. Lo-Vaca Gathering,* 379 U. S. 366; *FPC v. Amerada Petroleum Corp.,* 379 U. S. 687; *United Gas Improvement Co. v. Continental Oil Co.,* 381 U. S. 392. In the present case, the Commission abandoned these precedents and permitted just such a gap in the regulation of the interstate movement of gas. Recently, in a three-to-two decision the Commission has relied on the precedent of the present case in order to open still wider the gap in regulatory control of so-called "nonjurisdictional" interstate sales of gas. *Florida Gas Transmission Co.,* Docket No. CP65-393, Opinion No. 516, issued March 1, 1967.

Because of the serious threat to the effective regulation of interstate sales of natural gas presented by the Commission's abdication of jurisdiction in the present case and the more far-reaching threat to the sort of effective price regulation which Movants have sought as a protection for their consumer customers, the Movants are constrained to seek the permission of this Court to advance the argument

set forth in the accompanying brief *amici curiae* in support of the Petition for a Writ of Certiorari.

Respectfully submitted,

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INTEREST OF AMICI CURIAE.

The interest of the amici curiae in this case is set forth in the Motion to which this Brief is attached.

REASON FOR GRANTING THE WRIT.

The decision below permits the opening of a gap in regulatory jurisdiction over interstate sales of natural gas. Unfortunately, because of the posture of the transaction involved—delivery of gas by Texaco to Transco and a receipt of gas by Texaco from Transco—the nature of the gap has been obscured.

Because of the "intra-Texaco" nature of the transaction here under consideration the Court of Appeals below was apparently misled into considering various purely technical questions, without coming to grips with the real policy issue posed under the Natural Gas Act. Thus the court concerned itself with questions of passage of title and bailment of a fungible commodity. On the basis of these technical considerations it concluded that no "sale" had taken place and that the entire transaction was as nonjurisdictional as concededly would have been Texaco's use of its own gas near the wellhead in Louisiana or Texas. Such an approach overlooks the real effect of the transaction. This effect can be shown best by hypothetical illustration. Sales by producers for ultimate intrastate use and consumption by producers of their own gas within the state of production are both transactions which are excluded from the Commission's jurisdiction by the Natural Gas Act. Sales in interstate commerce, however, are uniformly subjected to Commission jurisdiction, and Congress intended no "attractive gap" to exist in such regulation. *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1.

Given this jurisdictional structure, the following situation will inevitably arise when an excessively high interstate price structure for new gas has been created as the result of a relative inadequacy of supply during a preceding period. The individual producer will, if possible, seek to avoid any undercutting of a high interstate price structure by using "cheaper" surplus new gas in its refineries

or petrochemical plants within the state of production. Independent producers are increasingly diversifying their operations by expansion into the field of petrochemical manufacture, a process which consumes enormous quantities of natural gas. Such a practice can and does obviously have an adverse impact on the consumer of natural gas, because it tends to insulate the interstate market from the helpful corrective action of abundant supplies pressing on the market. Such a situation however may be presumed to have been contemplated by Congress and to have formed part of the balance which Congress struck between intra- and interstate regulation. The balance is reasonable, since refinery and petrochemical concentration within a given state is not likely to be unreasonably dense.

However, if the intrastate refinery market is saturated and the producer, to avoid undercutting an artifically high interstate gas price structure, seeks an outlet in its refineries or petrochemical plants in all the other 47 continental states, the Natural Gas Act clearly imposes on the Commission the duty under § 7 to inquire into the public interest impact of such transactions. *FPC v. Transcontinental Gas Pipe Line Corp., supra.*

Both the Commission and the Court of Appeals failed to appreciate the nature of this duty, apparently because both viewed a transaction which was "intra-Texaco" as being identical in effect with one which was truly "intrastate" in nature—despite the fact that the interstate character of this Louisiana-Pennsylvania transaction was obvious. In so concluding the Commission and the Court of Appeals acquiesced in the refusal of Texaco and Transco to put in the record any evidence from which the Commission could determine the impact of Transco's acquisition of this substantial supply of (cheap? expensive?) gas upon field prices generally and upon the interstate market.* The action of the Commission in issuing certificates of

* Moreover the Commission refused to ~~advance~~ receive an offer of evidence on this subject by intervenors (972-74).

public convenience and necessity in the face of such a blank in the record substituted guess work for informed discretion and constituted plain error. *Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 378. The inevitable effect of such a ruling, made as a matter of law, is that, while on the one hand it does nothing to impede the upward movement of prices when supplies are short, on the other hand, when supplies become abundant it insulates the interstate market from downward price pressure by permitting the proliferation of this type of "intrastate" sale throughout the continental United States. The threat is a real one (R. 1856).

Equally serious, the present case has now become a precedent for permitting other users of large quantities of gas to acquire substantial reserves by means of such "intrastate" transactions. *Florida Gas Transmission Co.*, Docket No. CP65-393, Opinion 516, issued March 1, 1967. That case, on "all fours" with the *X-20* case, *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1, involved a sale by independent producers in Louisiana to Florida Power & Light Company for use as fuel for its electric generating plants. The Commission expressly held that it had no jurisdiction over the price of the producers' sales, despite their interstate character and potential adverse impact on field prices. It thereby abandoned the entire in-line approach which it had developed for South Louisiana in a series of earlier cases and which this Court had affirmed. *United Gas Improvement Co. v. Callery Properties*, 382 U. S. 223. It is significant that this abandonment came in the *Florida Gas* case, in which there were no intervenors interested in safeguarding consumer price protection.* The issue of jurisdiction over such sales was expressly reserved by this Court in *FPC v. Lo-Vaca Gathering*, 379 U. S. 366. The case here under review opens a serious gap in the regulation of the interstate movement of gas, a gap which has already

* The New York Public Service Commission has subsequently noticed its intervention in the *Florida Gas* case and requested rehearing on this jurisdictional issue.

been substantially widened in the *Florida Gas* case, with increasing potential for further widening still and consequent harm to the consumer.

CONCLUSION.

For the foregoing reasons the Distributors and the New Jersey Board urge this Court to grant a writ of certiorari to review this impotant jurisdictional issue.

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SUPREME COURT, U. S.

JUN 19 1967

JOHN F. DAVIS, CLERK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 93

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, TRANSCONTINENTAL GAS PIPE LINE CORPORATION AND TEXACO INC., *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT TRANSCONTINENTAL GAS PIPE LINE CORPORATION

BASIC QUESTION PRESENTED

Is a conventional transportation for hire arrangement converted into:

(1) a sale by the owner-shipper to the pipeline-transporter; and,

(2) a resale by the pipeline-transporter to the owner-shipper

solely by reason of the commingling of the transportation gas in the pipeline with other interstate gas owned and sold by the pipeline?

PARTIAL RESTATEMENT

The Commission, after oral argument held October 20, 1964, took jurisdiction over the arrangement between Transco[1] and Texaco[1] as a conventional transportation arrangement and issued a certificate to Transco covering the transportation. The Commission, fully aware of the commingling of the Texaco gas in Transco's line, in a unanimous opinion declined to treat the delivery of gas by the shipper, Texaco, to the transporter, Transco, as a sale. Instead, it treated such delivery by Texaco as being "governed by historic notions of bailments." (R. 2037). The court below also recognized the fact of the commingling of the transportation gas with other gas in Transco's pipeline, some of which is resold. It, in turn, unanimously refused to accept Petitioner's contention that the commingling or molecular theory enunciated in the *Lo-Vaca*[2] and *Amerada*[3] cases required the Commission to treat the delivery of gas by Texaco to Transco as a sale. It held such delivery to be part of a bailment and the arrangement between Texaco and Transco properly to be governed by historical law of bailments as had the Commission.

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[1] "Transco" is used to designate respondent, Transcontinental Gas Pipe Line Corporation and "Texaco" is used to designate respondent, Texaco Inc.

[2] *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965).

[3] *F.P.C.* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965).

REASONS FOR DENYING THE WRIT

A. The Commingling or Molecular Doctrine of Lo-Vaca and Amerada Is Irrelevant to Any Issue in the Instant Case Since There Was No Sale of Gas by Texaco to Transco for Resale or Otherwise

In the *Lo-Vaca* and *Amerada* cases relied upon by Petitioner, there were clear, conceded and unquestionable sales of gas by producers to pipeline companies. The gas so purchased by the pipelines was commingled in interstate pipelines by the pipelines with other interstate gas which was destined for resale by the pipelines. The narrow question in both *Lo-Vaca* and *Amerada* was whether the *sales* by the producers were sales for resale in interstate commerce. This Court held that by reason of such commingling, certain molecules or portions of the commingled gas were as a matter of physical fact resold by the pipelines to their interstate resale customers and consequently the sales by the producers were sales in interstate commerce for resale.

In the instant case there was no sale whatsoever by Texaco to Transco. The transaction between the two companies was a conventional transportation arrangement within the contemplation and purview of the Natural Gas Act and the legal relationship between the parties was that of bailor (Texaco) and bailee-for-hire (Transco).[4]

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[4] The legal relationship is substantially identical with that existing in the crude oil pipeline industry between the shipper and the oil pipeline carrier. In that industry, it is the frequent practice for crude oil to be commingled in the pipeline with that of other shippers and on occasion with that of the pipeline owner, provided that the various crude oils in the stream are of substantially equal quality. Tariffs of the crude oil pipeline companies, on file with the

Petitioner, by its attempted contortion of every shipper of gas, in a commingled pipe-line stream with gas for sale, into a seller of gas and every pipeline carrier of such gas into a purchaser of gas, would virtually write out of the Natural Gas Act any concept of transportation for hire. But, in its attempt it is at odds with this Court's reading of the Natural Gas Act. In the recent *United Gas* case,[5] Justice White, speaking for a unanimous Court, stated at page 89:

> "The Act gives the Commission jurisdiction over interstate transportation of natural gas as a separate and distinct matter, *whether the transportation is for hire* or for sale and whether the sale is for consumption or resale. FPC v. East Ohio Gas Co., 338 U.S. 464; FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1; Panhandle Eastern Pipe Line Co. v. FPC, 359 F.2d 675."[6]

Interstate Commerce Commission, contain provisions of which the following, taken from ICC Tariff No. 136 of Arapahoe Pipeline Company, are typical in import:

> "6. *Quality of Crude Petroleum Received.* No crude petroleum will be received for transportation as part of a 'common stream' except good merchantable crude petroleum of acceptable character readily susceptible of transportation through carrier's existing facilities, and will not materially affect the quality of the crude petroleum.
>
> * * * * *
>
> "8. *Quality of Crude Petroleum Delivered.* Carrier shall be under no obligation to make delivery of the identical crude petroleum which it may receive, but all such crude petroleum received for transportation may be delivered out of the 'common stream' of carrier."

At the time of the enactment of the Natural Gas Act in 1938, Congress was, undoubtedly, aware of the practices and legal relationships in the oil pipeline industry, since it had enacted legislation for the regulation of the oil pipelines in 1906 under the Hepburn Act, 49 U.S.C. § 1, 34 Stat. 584; June 29, 1906, Ch. 3591.

[5] *United Gas Pipe Line Company* v. *F.P.C.*, 385 U.S. 83 (1966).

[6] Throughout this brief emphasis in quoted material is supplied.

This pronouncement of the Court is buttressed by the background of the Act as evidenced by the Federal Trade Commission Report cited in Section 1(a) of the Act and by the repeated interpretation of the Act by the Commission in its certification of transactions which were transportations for hire. The Final Report of the Trade Commission study[7] contains an enormously detailed commentary on all aspects of the natural gas pipeline industry, as it then existed, with the following relevant statements on the nature and kind of activities performed:

> "There were . . . examined during the investigation the books and records of 24 companies whose business consisted solely of transmitting natural gas from the production field to the markets, at which latter points the gas was either sold at wholesale *or was delivered for a transportation charge.*"[8]

In another place, where the Trade Commission reported on the income of the natural gas transmission companies, the Final Report had this observation:

> "The income of natural gas pipeline or transmission companies was generally derived from sales of natural gas, although some transmission companies derived their principal income from transporting natural gas for other companies for fees. . . . A few of those transmission companies which were generally engaged in buying and selling natural gas also derived a minor portion of their income *from transporting gas for others for a fee.*"[9]

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[7] Senate Doc. 92, Part 84-A, 70th Cong., 1st Sess.

[8] *Ibid,* at page 358.

[9] *Ibid.*, at page 453.

At the foot of the Final Report, in stating its ultimate recommendation, the Trade Commission study said that, among other remedial legislation:

> "A Federal regulatory law should be enacted applicable to interstate natural gas pipe lines which transport gas for ultimate sale to and use by the public, regulating contracts for purchase of gas to be transported interstate, *or regulating rates for carriage* or city gate rates at the end of such transportation, or all of these." [10]

Also, in the detailed description of the operations of the transmission companies studied by the Trade Commission, it is evident that *both* the sale and transport services were carried on by the same enterprise.[11] And, it is obvious in the foregoing that the Trade Commission was discussing commingled transport and sale activities by the same pipeline.

Nothing in the legislative history of the Natural Gas Act dilutes or changes any of the foregoing observations or comments of the Trade Commission concerning the activities of pipeline companies. In the decision of the Commission here for review, it said (R. 2035):

> "Considering the fact that the pipeline industry had evolved to a considerable extent by the time Congress enacted the Gas Act, it is noteworthy that the term 'transportation' was specifically included."

Thus, the Commission was aware, in deciding the instant case of the historical context of the transportation concept, as it was incorporated into the Act.

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[10] *Ibid.*, at pages 616-17. Citations omitted.

[11] *Ibid.*, at page 453.

Judicial interpretation of the Act, at the highest level, confirms the conclusion that the "transportation" activity is a separate and special area of the Commission's jurisdiction. In *Panhandle Eastern Pipeline Co.* v. *Public Service Commission,* 332 U.S. 507, 516 (1947), the Court, in describing the breadth of Federal jurisdiction under the Natural Gas Act, as expressed in Section 1(b), said:

> ". . . Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale."

Again, in *F.P.C.* v. *East Ohio Gas Company,* 338 U.S. 464, 468 (1950), after first making clear that the term "transportation" in Section 1(b) of the Gas Act included transportation for hire as well as transportation preceding sales for resale, the Court said, with even greater precision, that:

> ". . . [Section] 1(b) made the Natural Gas Act applicable to three separate things: '(1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.' And throughout the Act 'transportation' and 'sale' are viewed as separate subjects of regulation. They have independent and equally important places in the Act."

This contrast between transportation "or" sale—this "disjunctive phrasing" as it was styled by the Supreme Court in the *East Ohio* case, *supra* (338 U.S. at 468)—is carried also into the important rate regu-

lation provisions of Sections 4(a), 4(b), 4(c) and 5(a)[12] of the Gas Act. Section 4(a), for example, provides that:

> "All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation *or* sale of natural gas . . . shall be just and reasonable . . ."

A rate made or demanded for transportation can exist only in the context of the type of service proposed here, that is, a rate for the carriage of gas.

The other rate regulating provisions referred to, maintain the same sharp distinction between rates for transportation *or* sale.

The Federal Power Commission has conventionally, continually, and often routinely, granted certificates permitting transportation arrangements similar to the Transco-Texaco contract. *Trans-Continental Gas Pipe Line Company, Inc.*, 7 FPC 24, 13 FPC 1006, 14 FPC 333, 22 FPC 836; *Houston Texas Gas & Oil Corp.*, 16 FPC 118; *aff'd sub nom. Florida Economic Advisory Council* v. *FPC*, 251 F. 2d 643 (D.C. Cir. 1957); *cert. denied*, 356 U.S. 959 (1958); *Texas Gas Transmission Corporation*, 29 FPC 140; *Texas Gas Transmission Corporation*, 30 FPC 689;[13] *Chandeleur Pipe Line*

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[12] 15 U.S.C. §§ 717c and 717d.

[13] The transportation service authorized in the cited case is also rendered for Texaco, for the carriage of its gas in a stream commingled with resale gas from Louisiana production points to its Lawrenceville, Illinois refinery. The transportation agreement between Texas Gas Transmission and Texaco was executed *after* the contract involved in this case, and routinely approved by the Commission, without a formal hearing, because none of Texas Gas' customers objected to the proposal.

Company, 30 FPC 1515; *Sabine Pipe Line Company,* 31 FPC 696. In some of these cases, the transportation volumes are carried commingled with the gas supply for the resale services; in other cases, the pipeline performs only the transportation service for a single customer. These are barely a recent few of the reported cases. As the Commission noted in its Opinion below (R. 2035):

> "In the past, the Commission has approved several transportation arrangements of a type similar to that presented here. At the present time, there are 25 transportation rate schedules on file with the Commission by 13 different pipelines."

The court below held that "The arrangement between Texaco and Transcon would involve nothing more than the bailment of a fungible commodity" and in this connection pointed out, as the Commission had found (R. 2036), that no transfer of title was intended by the parties (371 F. 2d 4 [1, 2]). Petitioner, nevertheless, persists (Pet. p. 13) in contending that there was a transfer of title by Texaco for the asserted reasons that: "(1) Article 12 of the contract between Transco and Texaco provided that Transco would assume the risk of loss while the gas was in its possession, and (2) Article 10 of the General Terms and Conditions applicable to all of Transco's filed F.P.C. Rate Schedules set forth in its Gas Tariff provides that:

> 'Seller agrees that it will and it hereby does warrant for itself, its successors and assigns, that at the time of delivery it will have good title to all natural gas delivered by it to Buyer, free and clear of all liens, encumbrances and claims whatsoever, * * *' "

Petitioner's "assumption of risk" argument as evidence of title in Transco was considered and conclusively disposed of by the court below (371 F. 2d at p. 4).

Petitioner's other title argument, based upon the provision of Transco's Tariff, is erroneous. The provision of Transco's Tariff cited by Petitioner is applicable only to its sales rate schedules; it has no application to the transportation rate schedule which is involved in the instant case.[14] The sales of gas which are made by Transco come out of that portion of the commingled gas in its pipeline which is exclusive of that portion of gas which is required to be apportioned to the transportation arrangement with Texaco. Under the Commission's Regulations Under the Natural Gas Act (§ 260.7), Transco is required to furnish to the Commission an exhaustive statement (Form 15) of its gas supply which is required to support Transco's sales to its customers. No part of the gas, which is the subject of the Texaco transportation, is included in Form 15 or in the reserves dedicated to Transco's sales contracts. Therefore, Transco does have title and warrants title only to the gas delivered to its gas *buyers.*

An analogy is found in the grain warehouse cases. In that field, grain of others is commonly commingled in a fungible mass with that of the warehouse owner. Each of the persons retains title to his proportionate share of the commingled mass. The same is true in respect to the ownership of the "common stream" in the oil pipeline cases.

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[14] The transportation agreement between Texaco and Transco (R. 1179-1209) is itself the rate schedule filed with the Commission, as part of Transco's Tariff, Volume No. 2. An entirely separate Volume No. 1 contains the sales rate schedules as well as the General Terms and Conditions relied upon by Petitioner.

B. The Transportation Arrangement Between Texaco and Transco Leaves No Regulatory Gap

Petitioner contends that the Commission should have treated the delivery of gas by Texaco to Transco as a sale and that such a holding is necessary in order to avoid a "regulatory gap" (Pet. p. 14).

At the outset it is to be emphasized in any discussion of "regulatory gap" that the transportation arrangement between Texaco and Transco was *not* contrived by the parties thereto for the purpose of avoiding Commission regulation as the lower court observed was the case in *Lo-Vaca*.[15] It is this critical distinction which made the *Lo-Vaca* case important and which makes the instant case not of broad importance in the administration of the Natural Gas Act.

Treating the delivery of gas by Texaco to Transco as a sale and a consequent sale back to Texaco by Transco at Texaco's refinery, as urged by Petitioner, would be creating an utterly fictional series of sales with no attendant benefits to Transco's customers or the ultimate consumer. The "sale" back to Texaco at the refinery would become a non-jurisdictional "direct" sale, and the rate for such direct sale admittedly would be beyond the power of the Commission to control (R. 2038). In any rate proceeding of Transco, the Commission would allocate to this direct sale only the properly attributable system costs. The balance of the revenues to be derived from the service above

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[15] "The parties [in Lo-Vaca] attempted by the contracts to evade Commission jurisdiction. * * * Further, the arrangement between Texaco and Transcon was not devised to avoid regulation; in fact, the transaction was cast in a form which made it subject to the jurisdiction which the Commission properly assumed." 371 F. 2d 1, at p. 5.

the properly allocated costs would not then be credited to Transco's jurisdictional customers as under the proposed conventional transportation arrangement. Thus, the substantial benefits to Transco's system, and consequently to its jurisdictional customers, which the Commission found to exist under the conventional transportation arrangement (R. 2037), would be effectively circumvented under the series of sales rearrangement proposed by Petitioner. It is clear, therefore, that as far as the consumer is concerned, the tortured series of sales suggested by Petitioner in this case would have exactly the opposite result from that accomplished in the *Lo-Vaca* and *Rayne Field*[16] cases.

Furthermore, there is no regulatory necessity to treat the delivery by Texaco to Transco as a sale in order to fill some fictional regulatory gap. If the Commission, on sufficient findings, determined the transportation arrangement to be contrary to the public interest, it could impose lethal regulatory sanction upon Texaco by denying the transportation certificate to Transco as it did in the *X-20* case.[17] The Commission itself emphasized this fact in its Opinion (R. 2037):

> "The Commission has full and complete authority over the transportation agreement, and Texaco could not inject one Mcf of gas into Transco's interstate pipeline unless the Commission is satisfied that the transportation service is required by the public interest."

Having authorized the transportation arrangement, the Commission, of course, has continuing regulatory

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[16] *Public Service Commission* v. *F.P.C.*, 287 F. 2d 143 (D.C. Cir. 1960); *U.G.I.* v. *Continental Oil Company*, 381 U.S. 392 (1965).

[17] *F.P.C.* v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1 (1961).

authority over the transportation rate, thus enabling it to adjust that rate to properly harmonize with Transco's other jurisdictional rates.

At various places on pages 9 and 25-28 of the petition, Petitioner adverts to the recent opinion (No. 516) of the Commission in *Florida Gas Transmission Company,* issued March 1, 1967, ... FPC ..., where the Commission, citing the decision of the court below in the instant case, declined to assert direct jurisdiction over a *sale* of natural gas in the field by a producer to an electric generating company, to be transported in interstate commerce by a natural gas pipeline company commingled with the transporter's sale gas. Obviously, the facts in that case differ radically from the facts in the instant case, most importantly because here there is no sale by Texaco to anyone.

Furthermore, in practical effect, the opinion of the Commission in the *Florida* case is *sui generis.* Subsequent to the issuance of the Commission's opinion, the parties proposed a settlement stipulation which reduced the producer's sales prices, which settlement was finally approved by the Commission. However, the Public Service Commission of New York, which had petitioned to intervene after the Commission's decision, while refraining from opposing the settlement, nevertheless put the Commission on notice that in any future case involving a similar type of arrangement it would intervene, and if necessary, litigate the question of Commission jurisdiction over the producer sales. Judicial resolution of the issue in the *Florida* case, expressly reserved in *Lo-Vaca,* should await appropriate occasion and that case should not be treated as the basis for certiorari in the present case.

C. No Error Was Involved in the Presiding Examiner's Taking Official Notice of Material Contained in Another Docket.

Petitioner devotes a full point (D, Pet., p. 19) to its claim that the Examiner erred in utilizing material from another docket (CP64-96) as a part of the basis for his decision and thereby committed prejudicial error in violation of the Administrative Procedure Act.[18] Petitioner's claim is groundless.

Section 7(d) of the Administrative Procedure Act recognizes that official notice may be taken "of a material fact not appearing in the evidence of record," and provides that "any party shall on timely requests be afforded an opportunity to show the contrary." Act of June 11, 1946, c. 324, § 7, 60 Stat. 241.

At the hearing before the Examiner, after references had been made to the application in Docket No. CP64-96, the Examiner stated (R. 654-655), that unless there were objection he would take official notice of the application and asked if there was any objection. The record shows no objection (R. 654-655). In his decision, the Examiner stated (R. 1766):

> "The participants stipulated that the Examiner could take official notice of the then pending application in Docket No. CP64-96."

Public Service took no exception to that statement (R. 1817-1861; see particularly, R. 1837-1845) and thereby waived any objection. Federal Power Commission Rules of Practice and Procedure, Section 1.31(c), 18 C.F.R. 1.31(c); *Wisconsin* v. *F.P.C.*, 201 F. 2d 183, 186-187 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 934 (1953). As the District of Columbia Circuit there held:

> "* * * [T]he objection—if any—to the taking of official notice by the Examiner was waived by

[18] June 11, 1946, c. 324 § 7, 60 Stat. 241, 5 U.S.C. § 1006(d).

> failure to file appropriate exception under the Commission's rules [citing § 1.31(c)]; the Company thereafter could not complain if the Commission likewise took official notice. * * *"

Furthermore, Petitioner is plainly wrong in claiming that "the showing of economic feasibility is clearly not supported by 'substantial evidence' " Pet., p. 20 (Emphasis in original). All of the economic studies, upon which the Commission made findings, were based upon the $4,258,000 of investment, even though a portion of that investment was authorized in another docket. On the basis of this evidence the Commission, without contradiction, found that the proposed arrangement yielded a 12.64% rate of return on an incremental basis and that such incremental return would redound to the benefit of all of Transco's jurisdictional customers.

D. Petitioner's Contention That the Evidence of Record Does Not Substantiate the Commission's Findings of Present or Future Public Convenience and Necessity Is Without Merit

Petitioner argues that the Commission should have reached contrary conclusions on the merits of the transportation service (Pet., pp. 21-24).

It is well settled, of course, that it is not the function of a reviewing court to consider *de novo* the record before the administrative agency and make new findings or substitute its evaluation of the record for the Commission's determinations. The agency in this case has applied statutory standards to a particular situation. In this case, therefore, the Court's responsibility is properly limited to reviewing whether the Commission's determination has "warrant in the record" and a reasonable basis in law. *Atlantic Refining Co.* v. *Federal Trade Commission,* 381 U.S. 357 (1965); *N.L.R.B.* v. *Hearst Publications, Inc.,* 322 U.S. 111 (1944).

These same "public interest contentions" were exhaustively argued in briefs to the Examiner, on exceptions to the Examiner's Decision, on oral argument before the Commission[19] and in briefs and argument to the court below. It is respectfully submitted that these issues have been exhaustively considered by the forums which have heretofore passed upon them. The contentions do not warrant further review by this Court and certainly do not fall into any category acceptable as a basis for the grant of certiorari.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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June, 1967

[19] As observed by the court below, 371 F. 2d 1, at p. 6:

"The decision of the Commission and its opinion on the petition for rehearing clearly indicate that careful consideration was given to all of the factors bearing on the public interest."

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No. 1281

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, TRANSCONTINENTAL GAS PIPE LINE CORPORATION AND TEXACO INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TEXACO INC.

OPINIONS BELOW

The opinion of the Court of Appeals issued January 18, 1967 is reported at 371 F. 2d 1 and is reprinted as Appendix A to the petition filed by Public Service Electric and Gas Company (Public Service) in No. 1281. The opinion and order of the Federal Power Commission (Commission) is reported at 33 F.P.C. 237 (1965). The opinion and order of the Commission on petition for rehearing is reported at 33 F.P.C. 818 (1965).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Is a conventional transportation for hire arrangement by a natural gas pipeline converted into a series of sales merely because intermingling of the transportation gas with other gas transported and sold by the pipeline makes delivery to the shipper of the identical gas molecules previously tendered for transportation only coincidental?

2. Does the Natural Gas Act require an application for a certificate of public convenience and necessity for the operation of a 4½ mile existing intrastate refinery lead-in line utilized to deliver gas solely for own-use consumption where such line is currently subject to regulation by state authorities?

3. After considering an adequate record supporting all the elements of the public interest, and the public convenience and necessity, as they pertain to the proposed operations, was the Federal Power Commission justified in authorizing the transportation service?

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act (52 Stat. 821-833, as amended, 15 U.S.C. §§ 717-717w) are set forth in the Petition.

STATEMENT OF THE CASE

Transcontinental Gas Pipe Line Corporation (Transco) proposes to transport natural gas for Texaco Inc. (Texaco) from origins in the Texas-Louisiana Gulf Coast producing area to Texaco's Eagle Point Refinery near Westville, New Jersey. Texaco owns and produces the transport gas in the

Texas-Louisiana area and proposes to utilize it to convert certain refinery operations, now using fuel oil, to the use of its own natural gas in order to lower operating costs.

Transco is an interstate pipeline, and a natural gas company within the meaning of the Natural Gas Act,[1] and in that status, applied to the Federal Power Commission for authority to construct and operate the necessary additional facilities and to perform the transportation service. No party to this proceeding, or the hearings before the Federal Power Commission, opposes the proposed conversion of the refinery operations to the use of natural gas.

Texaco's refinery is located within the distribution territory of Public Service. Over many years prior to the negotiation of the Transco-Texaco transportation contract, Public Service sought ways and means to convert the Texaco refinery operations from fuel oil to natural gas, but was unable to offer a price which was low enough to economically justify conversion. At the hearing below, Public Service opposed the transportation service on numerous and often inconsistent grounds. It claimed, *inter alia,* that the service was improperly priced; that it would usurp capacity in the Transco line which should be held for future use; that Transco lacked the ability to deliver the proposed interruptible volumes because of inadequate "valley" capacity; and that Texaco would not receive significant benefits from the changeover.

The Commission had the benefit of an exhaustively detailed Examiner's Initial Decision which considered and rejected each of the Petitioner's contentions and recommended that a certificate of public convenience and necessity be issued to Transco to perform the transportation service. The Commission affirmed the Examiner's findings

[1] 52 Stat. 821 (1938), 15 U.S.C. §§ 717a, *et seq.*

in every regard, including findings that the proposed service would earn a generous return on the Transco facilities required, and that the revenues from such service would exceed the associated incremental costs by about $600,000 annually as a contribution to the support of Transco's other jurisdictional services. A denial of Transco's certificate application would result in the continued burning of fuel oil at the refinery and a loss of the above benefits to Transco's jurisdictional customers since the record conclusively establishes Public Service is unable to provide an economical alternative gas supply.

While the matter was pending below, the Commission on its own motion raised the question whether the transportation arrangement between Texaco and Transco as a result of commingling in the pipeline of the transport gas with Transco's wholesale gas supply " . . . involves a sale of gas by Texaco to Transco for resale by the latter so that the producer [Texaco] should be required to secure a certificate." (J.A. 1951-52) This legal issue had not been raised previously in the proceeding, but Public Service immediately embraced it as an additional basis on which to attack the transportation service. Petitioner contended that molecular commingling required that a traditional transportation contract should be tortured into a series of sales, and that Texaco should be required to obtain a certificate before tendering its gas to Transco for transport.

A unanimous Commission disagreed. The Supreme Court had decided *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), *before* the decision below was issued. The Commission considered Petitioner's contentions in the light of the *Lo-Vaca* decision and concluded that the instant transportation arrangement was not contrived to avoid federal regulation. It further found there was no reason or justification to depart from firmly established principles

of bailment relating to the commingling of fungible commodities in order to reform the transportation arrangement into a series of sales. The Commission also concluded that if it were to adopt Public Service's contentions, it would then lack authority to regulate the rate for the sale by Transco to Texaco at the delivery point to the refinery. This lack of jurisdiction, under the provisions of Sections 1(b) and 4 of the Natural Gas Act, would deny the financial benefits of the transportation service to the jurisdictional customers of Transco and one of the substantial public interest justifications for the instant proposal would be frustrated.

The United States Court of Appeals for the Third Circuit unanimously affirmed the decision of the Commission in all respects.

REASONS THE WRIT SHOULD BE DENIED

A. The Commingling Doctrine Does Not Convert a Jurisdictional Transportation Arrangement Into a Sale for Resale

The transportation arrangement between Texaco and Transco which is the subject of this litigation has been at all times fully subject to the jurisdiction of the Commission. After a comprehensive review of all public interest factors, it was certificated by the Commission under Section 7(c) of the Natural Gas Act as being within the public convenience and necessity. Accordingly, this case does not present any "regulatory gap" issues of the type raised in prior proceedings where parties sought to avoid Commission jurisdiction by resort to contract allocation of commingled sales volumes to non-jurisdictional markets or the direct assignment of leasehold interest to the pipeline purchaser (in-place sales). *California* v. *Lo-Vaca Gathering*

Co., 379 U.S. 366 (1965); *F.P.C.* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965); *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 (1965). In its Opinion, the Commission correctly noted:

> "The Commission has full and complete authority over the transportation agreement, and Texaco could not inject one Mcf of gas into Transco's interstate pipeline unless the Commission is satisfied that the transportation service is required by the public interest." (J.A. 2037)

The jurisdiction of the Commission conferred by Section 1(b) of the Natural Gas Act falls within three distinct categories: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. *United Gas Pipe Line Co.* v. *F.P.C.*, ... U.S. ....., 17 L ed 2d 181, 185, 87 S Ct ..... (1966); *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 516 (1947); *F.P.C.* v. *East Ohio Gas Co.*, 338 U.S. 464, 468 (1950). The statutory standard of public convenience and necessity established by Section 7 of the Natural Gas Act applies to each of the above jurisdictional activities.

Petitioner seeks to have this Court declare that the *Lo-Vaca* doctrine removes the concept of transportation for hire from the Natural Gas Act where commingling occurs simply because natural gas pipeline companies do not guarantee delivery to the shipper of the identical gas molecules which were previously tendered for transportation. Both the Commission and the court below correctly recognized that mere physical commingling does not compel rejection of historic notions of bailment relating to fungible commodities and require the transformation of a transportation agreement into a succession of sales. This

Court in both *Lo-Vaca* (379 U.S. at 370) and *Amerada* (379 U.S. at 691) indicated that there may be instances where original commingling does not require a particular transaction to be subject to the Commission's sale for resale jurisdiction. Therefore, the holdings of the Commission and the court below are in no way in conflict with this Court's decisions in *Lo-Vaca* and *Amerada*.

There is no justification for requiring the Commission to apply the molecular commingling doctrine to torture what obviously is intended to be a transportation arrangement into a series of sales. The Commission's scrutiny and control over the transportation service could have been no more complete had it reformed the transaction into a series of sales and certificated it under its sale for resale jurisdiction. The evidence adduced at the hearing below in support of Transco's transportation certificate application fully covered all factors which the Commission would look to if it were to require Texaco to apply for a second duplicative sales certificate covering the same transaction.[2]

Moreover, by being able to treat the Transco-Texaco agreement as "transportation" rather than a "sale for resale," the Commission was able to avoid certain undesirable consequences which would naturally flow from any requirement that the transaction be recast into a series of sales. The Commission found:

> "The present transaction precludes triggering of Transco's gas purchase contracts covering gas produced in Texas which might otherwise occur under a typical gas purchase contract. In addition, the instant arrangement allows the parties considerable operating

[2] The Commission found that Texaco has an adequate gas supply, that its refinery constitutes an adequate market, that it has reasonable and feasible facilities, that it is financially able to perform its contractual undertaking and that the project is economically feasible.

flexibility in that specific leaseholds are not dedicated. The proposed service also will benefit Transco's other jurisdictional customers from a cost standpoint. The record indicates that the jurisdictional transportation revenues will exceed the associated incremental costs by about $600,000 annually.

"None of the foregoing benefits would be available to Transco's jurisdictional customers if the proposed transaction were viewed as a sale from Texaco to Transco and a resale back to Texaco. The latter would be a nonjurisdictional direct industrial sale and hence immune from consideration in a rate proceeding." (J.A. 2037-38)

In contrast, Petitioner has completely failed to suggest what additional factors the Commission should have considered and what additional public interest benefits would have been obtained had the Commission required the Transco-Texaco arrangement to be artificially recast into a series of sales or exchanges.

To reform the transportation agreement into a sale and resale arrangement would be to pervert completely the basic legal relationships contemplated by the parties. It would also conflict with the principles announced in *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 (1965), involving "in place" sales of natural gas where the substance rather than the form of the transaction was held to be controlling. The following factors clearly establish the parties intended a bona fide transportation arrangement and not a subterfuge for a jurisdictional sale:

(1) Texaco is receiving no sales revenue from Transco under the transportation arrangement but

rather is paying Transco to perform a transportation service.[3]

(2) Ownership or title of the gas delivered by Texaco to Transco in Texas and Louisiana does not pass to Transco and such gas does not become part of Transco's gas inventory available for sale to third parties.

(3) The transportation agreement in no way affects Transco's cost of purchased gas as reflected in its resale rates to its distribution customers.

(4) Risk of loss in force majeure situations is shared by Texaco even after delivery to Transco with Texaco remaining completely liable for all present or future gathering, severance or other taxes pertaining to the transport gas whether applicable prior to delivery in the field to Transco or after receipt by Texaco in New Jersey.

(5) The rate paid by Texaco to Transco for the transportation service is directly based upon the transportation component of Transco's contract-demand rate.

The above factors clearly distinguish the subject transportation arrangement from the mutual exchange of gas transactions reflected by the Commission's holdings in *Oklahoma Natural Gas Co.*, 23 F.P.C. 291 (1960), and *Shell Oil Co.*, 25 F.P.C. 1316 (1961), relied upon by Public Service.

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[3] Therefore, it cannot seriously be contended that an attractive unregulated market has been created which permits favored producers to make sales at prices in excess of the Commission's approved rate ceilings. This was the situation which this Court found in *Lo-Vaca* where the transaction admittedly involved a producer sale and the only issue was whether such sale was in interstate commerce and subject to Commission jurisdiction as a result of commingling.

Petitioner's reliance upon *Connecticut Light & Power Co.* v. *F.P.C.*, 324 U.S. 515 (1945), and *F.P.C.* v. *Southern California Edison Co.*, 376 U.S. 205 (1964), is also misplaced. The arrangements at issue in these cases were concededly *sales* in the first instance. The issue was whether such sales were *in interstate commerce* rather than intrastate commerce by virtue of commingling. In *Lo-Vaca* the transaction also involved a producer *sale* with the question presented being whether such sale was *for resale* when the pipeline purchaser in spite of commingling sought to allocate by contract such gas supply to its system compressors. The Commission and the courts have never held that the commingling doctrine was an appropriate basis for converting a transaction which was never intended to be a "sale" into a sales relationship. Therefore, the above cases are clearly inapposite and in no way in conflict with the holdings below. In its initial *Lo-Vaca* decision, the Commission expressly recognized that the "interstate commerce" issue was separate and apart from the question of whether the transaction contained the jurisdictional element of a "sale." *Lo-Vaca Gathering Co.*, 26 F.P.C. 606, 611 (1961). It further stated that it did not intend to apply the commingling doctrine to transportation arrangements such as those present in the instant case (26 F.P.C. at 611).

For the same reason, there is no conflict between the holding of the court below and the Fifth Circuit in *Louisiana Public Service Comm'n* v. *F.P.C.*, 359 F. 2d 525 (1966), *cert. denied*, ... U.S. ..... 17 L ed 2d 68, 87 S. Ct. ..... (1966). That case also involved an acknowledged pipeline *sale for resale* with the only issue being whether the transaction was *in interstate commerce* as a result of deliveries being made from the pipeline's commingled interstate stream.

Over the years the Commission has approved numerous transportation arrangements of a type similar to that au-

thorized here. It presently has on file 25 transportation rate schedules by 13 different pipelines. (J.A. 2035) To accept the argument urged by Public Service would for all practical purposes extinguish the Commission's long standing independent jurisdiction over transportation for hire in the case of every pipeline company which also carries its own wholesale gas for resale. This would have an extremely disruptive effect upon the industry and require material revision of many existing contractual arrangements and substantial additional filings and hearings. In many instances, it would result in the jurisdictional revenues presently received by the pipeline for transportation services becoming non-jurisdictional as a result of the final phase of such transactions becoming recast into direct industrial sales. Not only would substantial new rate design problems be created, but the net effect would be to exempt a great many more revenues from the Commission's jurisdiction than would ever be added by artificially recasting the first phase of traditional transportation arrangements into a sale or exchange.

Petitioner's suggestion that similar transportation arrangements will spread to other refineries or petrochemical companies is unsupported by the record and the experience of the past two years following the Commission's approval of the Transco-Texaco transportation service on February 17, 1965. To the extent future transportation projects may be proposed, they will, of course, be fully subject to Commission review and authorized only where consistent with the public convenience and necessity.

The Commission's recent decision in *Florida Gas Transmission Co.*, Docket No. CP65-393, Opinion No. 516, issued March 1, 1967, is irrelevant to the issues presented in the instant case. That proceeding involved a direct producer field sale to an electric generating company who contracted

with an interstate pipeline company for transportation from the field to the point of consumption. Issues relating to a direct producer field sale combined with a transportation arrangement are not raised in the instant case where there is no producer sale. Therefore, they must await subsequent adjudication. This fact was made clear by the Commission in its opinion below:

> "An essential feature of this transaction is that Texaco is the owner of the gas both at the beginning and the end of its journey from the wellhead to the point of ultimate consumption. It has merely contracted for conventional transportation arrangements subject to the Commission's jurisdiction. *While transfers of gas from a producer to a pipeline or from a pipeline to a direct customer may be treated as a sale for regulatory purposes in appropriate circumstances, we see no reason to do so in the circumstances of this case* where it is clear that the intermediate transactions result in returning the gas to the original producer-owner and no jurisdictional question is involved. In reaching this determination *we do not decide the status of the other types of transactions, such as that presented in the X-20 case.*" (J.A. 2037)[4]

Public Service's contention that Texaco may purchase gas from other producers or royalty owners to utilize in the transportation service is entirely inaccurate and unsupported by the record. It was summarily dismissed by the Commission on rehearing. (33 F.P.C. at 819-20).

The narrow facts of this case wherein a producer has arranged for the transportation of his own gas as an incident to that same producer's ultimate consumption of such gas have not created a broad legal precedent of sweeping impact upon the natural gas industry. The holdings of the court and Commission below are consistent with prior

[4] All emphasis herein supplied.

judicial decisions. Moreover, the legislative history of the Natural Gas Act recognizes transportation as a separate and distinct jurisdictional activity of natural gas pipeline companies. Petitioner's attempt to use this case as a vehicle to obtain advisory rulings covering totally different fact situations presented in other cases or which it speculates may arise in the future is manifestly improper.

B. The Commission Correctly Found That Texaco's Refinery Delivery Line Does Not Require Certification Under the Natural Gas Act

The Texaco produced gas transported by Transco is redelivered to Texaco at a meter station on Transco's transmission line approximately 4½ miles from Texaco's refinery. The lower court and the Commission correctly found that this delivery line was an integral part of Texaco's existing refinery facilities and that interstate commerce ceased when the transported gas was redelivered to Texaco at Transco's meter station. These holdings are consistent with prior Commission precedent and in no way inconsistent with this Court's decision in *F.P.C.* v. *East Ohio Gas Co., et al.*, 338 U.S. 464 (1950) relied upon by Petitioner.[5] In *East Ohio*, the gas was not delivered to the purchaser for own-use consumption but rather for further resale, thereby continuing the chain of interstate commerce. Moreover, the holding in *East Ohio* relied upon by Petitioner was subsequently modified by Congress. The Natural Gas Act was amended March 27, 1954 (68 Stat. 36) to add Section 1(c) which exempts from FPC jurisdiction the

[5] The Commission has consistently held that delivery lines constructed by the customers of interstate pipelines making direct industrial sales are not required to be certificated. *Anchor Hocking Glass Corp.*, 2 F.P.C. 930 (1941); *Jersey Central Power & Light Co.*, 9 F.P.C. 717 (1950); *Montana Power Co.*, 10 F.P.C. 950 (1951); *Reynolds Metals Co.*, letter order of March 27, 1959.

transportation of natural gas received at the boundary of the state if such gas is ultimately consumed within such state.

The contention that the Commission's failure to certificate Texaco's refinery lead-in line creates "a regulatory gap" is not worthy of serious consideration. It is difficult to comprehend exactly what Public Service would have the Commission regulate since no rate will be charged or paid in connection with the operation of this small own-use line and the only party who could be affected by its operation is Texaco itself. Moreover, such line is fully subject to all applicable statutes and regulations of the State of New Jersey and the New Jersey Board of Public Utility Commissioners.[6]

The issues relating to Texaco's own-use delivery line clearly raise no questions of general importance with respect to the Commission's administration of the Natural Gas Act and the holdings of the Commission and lower court are not in conflict with prior precedent.

C. The Transportation Service is in the Public Convenience and Necessity

It has been evident from the outset of this proceeding that due to the basic economics involved, Texaco's Eagle Point Refinery could never be a potential natural gas customer of Public Service. In an attempt to defeat or delay the transportation service, however, Public Service has raised every conceivable objection including: the preemption of available pipeline capacity; the alleged loss of cheap

[6] On September 28, 1964, the New Jersey Board of Public Utility Commissioners certified that Texaco's refinery lead-in line complied with all requirements of the Board's Administrative Order 14:295 under the Natural Gas Safety Act, Title 48 N.J.S.A., Chap. 10.

expansibility; the availability of valley capacity; the need by Texaco and the economic advantage to it of the proposed service; and the alleged lack of public interest benefits. Petitioner's attacks have clearly been "shot gun" in nature and generally relate to matters which would not directly affect Public Service even if its arguments were accepted. These issues were comprehensively dealt with by the Examiner in a lengthy opinion (J.A. 1758-1808) which was adopted by the Commission. The court below correctly noted the limited scope of judicial review under Section 19(b) of the Natural Gas Act and that the Commission's findings are conclusive if supported by "substantial evidence." After examining the record in its entirety, the court accepted the Commission's expert judgment and concluded that the challenged findings of fact were based upon "a thoughtful consideration of the evidence as a whole and a discriminating evaluation of competing factors."

This case does not present an issue of which of two competing alternative sources of gas supply is required by the public interest. Despite urging by the Commission Staff, Public Service completely failed to present during the hearings below a concrete proposal to supply firm and interruptible gas to Texaco's refinery on any basis other than that provided by its filed rates. The purchase of natural gas from Public Service at such rates would increase the present fuel bill of the refinery by over $2,000,000.00 per year. The Commission found that this increased fuel cost would overwhelmingly offset the economic advantage to be derived by utilizing natural gas over fuel oil as a refinery fuel.

Public Service seeks to usurp the benefits flowing from natural gas consumption at the Eagle Point Refinery for its private service area and its stockholders. In contrast, the proposed transportation arrangement provides benefits

inuring to *all* of Transco's customers of (1) a minimum return on the investment in facilities of 12.64%, (2) an improvement in load factor; and (3) an interruptible rate contributing approximately 20¢ per Mcf to the fixed cost of Transco's system. A denial of Transco's certificate application resulting in the continued burning of fuel oil at the Eagle Point Refinery would deprive the customers of Transco and Texaco of these special benefits and offer no offsetting public interest considerations.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 93

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
PETITIONER

v.

FEDERAL POWER COMMISSION,
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
TEXACO, INC..

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-12a) is reported at 371 F. 2d 1. The opinion and order of the Federal Power Commission (J.A. 271-281)[1] are reported at 33 F.P.C. 237 and its opin-

[1] "J.A." references are to the joint appendix in the court below.

ion and order denying rehearing (J.A. 299-304) at 33 F.P.C. 818.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1967 (Pet. App. A, pp. 11a-12a). The petition for a writ of certiorari was filed on April 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

The Federal Power Commission issued a certificate of public convenience and necessity authorizing a pipeline ("Transco") to transport natural gas for an independent producer ("Texaco") which was to deliver its gas to the pipeline in Louisiana and Texas and to accept the redelivery of equivalent quantities of gas from the pipeline near Texaco's refinery in New Jersey. The transported gas was to be commingled in the pipeline with gas purchased by Transco for resale in interstate commerce. The principal questions presented are:[2]

1. Whether the transportation agreement must be viewed as involving a sale of the gas to the pipeline followed by a sale by the pipeline at the terminal, solely because the gas was to be commingled with gas purchased by the pipeline for resale.

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[2] Petitioner also raises questions concerning the substantiality of the evidence to support various findings made by the Commission (see p. 10, n. 5, *infra*).

2. Whether the Commission erred in concluding that the transportation of the gas in interstate commerce ended when the gas was delivered to the producer near its refinery.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001-1011, and the Commission's Rules of Practice and Procedure, 18 C.F.R. 1 *et seq.*, appear in the Appendix, *infra*, pp. 12-15.

STATEMENT

Transcontinental Gas Pipe Line Corporation ("Transco"), the owner and operator of an interstate pipeline system, applied to the Federal Power Commission, pursuant to Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c), for a certificate of public convenience and necessity authorizing (1) the transportation of natural gas for Texaco Inc., from gas reserves which the latter owns in Texas and Louisiana, for consumption in the operation of Texaco's refinery at Westville in Gloucester County, New Jersey (J.A. 132), and (2) the construction of the facilities necessary for this transportation.

The arrangement (J.A. 132-137), designed to permit conversion of Texaco's refinery operations from fuel oil to natural gas in order to effect savings in its operating costs and to free fuel oil for other purposes, specifies the delivery of gas by Texaco to

Transco at mutually agreeable points in the producing areas of Texas and Louisiana where Texaco has available natural gas supplies, and the redelivery of an equivalent volume of gas of comparable quality by Transco to Texaco at a mutually agreeable point on Transco's existing Marcus Hook-Woodbury pipeline, which is approximately 4½ miles from the refinery (J.A. 136-138), the gas then to be delivered to the refinery through a newly constructed 100-foot line and an existing line that had previously been used to store refined products (J.A. 65, 169). The contract fixes a prices of 22¢ per Mcf for the service rendered by Transco. Texaco did not seek the Commission's authorization to construct or to operate the required new facilities for taking the gas from Transco's pipeline to Texaco's plant. Petitioner, a customer of Transco, intervened in the Commission proceeding to oppose the application.

The hearing examiner granted Transco the requested transportation authorization; he also held that Texaco did not require Commission authorization to construct and operate the new facilities. On review, the Commission, in its order granting a motion for oral argument, raised *sua sponte* the question whether the arrangement between Texaco and Transco involved a sale of gas by Texaco to Transco for resale by Transco and therefore required the producer to secure Commission authorization for the sale (J.A. 250-252). It subsequently concluded that the transaction might properly be regarded as one involving transportation. The Commission distinguished *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366—where this Court had

upheld the Commission's jurisdiction over producers' sales although the contracts specified that all of their gas (which was commingled with gas intended for resale in interstate commerce) would either be consumed in the producing State or used by the pipeline itself—as having involved a situation where there was a danger that substantial volumes of gas moving in interstate commerce might escape federal regulatory authority altogether. This danger was not present here, the Commission reasoned, since the terms of the transportation were subject to the agency's plenary certificate and rate authority (J.A. 279-280).

In denying a petition for rehearing the Commission also rejected the contention that Texaco was required to obtain a transportation certificate for its relatively short lead-in line. It found that this line had been, and would continue to be, used only for refinery purposes, since gas which enters into it cannot be resold, and that the line, as part of the plant facility, did not require certification.

The court of appeals affirmed, agreeing with the agency's legal conclusions and holding that its findings of fact were supported by substantial evidence.

ARGUMENT

1. Transco, an interstate pipeline company, agreed with Texaco to transport natural gas produced by Texaco from the latter's Texas and Louisiana fields to its New Jersey refinery, where the gas would be consumed. As required by Section 7(c) of the Natural Gas Act, the agreement was submitted to the Commission for its approval; and, after a hearing,

the Commission approved it upon finding that all of its terms were consistent with the public convenience and necessity. Petitioner contends, however, that the Commission was also required to assert jurisdiction over the transaction as a "sale" in order to prevent the emergence of a regulatory gap.[3] In our view, there is no such gap; the Commission's authority over the transaction *qua* transportation is fully adequate to protect the public interest. This is not a case where the gas consumer might be affected by the Commission's failure to treat a transaction as a sale within its jurisdiction, for Texaco consumes in its own plant all of the gas that Transco delivers to it in New Jersey. Nor can it be contended that the pipeline failed to make an adequate charge for the transportation service and thereby shifted to the pipeline's other customers (of which petitioner is one) a disproportionate share of the cost of transporting gas through its lines. The Commission carefully scrutinized the terms of the transportation agreement, as the statute requires, to determine their consistency with the public convenience and necessity. It affirmed (see J.A. 280-281) the examiner's express finding (see J.A. 201-213) that the price fixed by the agreement was not discriminatory or otherwise improper; petitioner does not challenge this finding. And, we stress, that price remains subject to the Commission's continuing rate jurisdiction (*infra*, p. 7).

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[3] The court below noted that the transaction was not rendered a sale by the pipeline's assumption of risk for the gas in transit. Such a provision is not unusual in contracts of carriage at common law.

Thus, in the context of this case, the Commission's approach provides as much protection for consumer interests as if it were required to determine whether, viewed as a sale, the transaction was consistent with the public convenience and necessity. The Commission could have disapproved the agreement here if it had found that its price or other terms were not in the public interest (it found the contrary). It can still direct modification of the terms in the future, should changed circumstances warrant. See *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348. And it can at any time initiate a proceeding to determine whether the rate provided for in the agreement remains a just and reasonable one. See Section 5(a) of the Act. Nor may the parties change the terms of the agreement without the Commission's approval.

The case is thus quite different from *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366. There, producers sold gas to a pipeline company which commingled their gas with other gas, selling a portion of the resulting volumes locally (or using them itself) and selling the remaining portion in interstate commerce for resale. This Court upheld the Commission's view that the producers' sales were subject to regulation by the Federal Power Commission, notwithstanding a stipulation in their contract with the pipeline that all of their gas would be either sold locally or used by the pipeline itself. By the fiction that a portion of the commingled gas in the pipeline could be traced to the particular producers' sales, the pro-

ducers and pipeline sought to avoid any continuing rate regulation by the Commission, whose jurisdiction over sales is limited to those in interstate commerce for resale. This Court refused to countenance such a loophole in the protections of the Natural Gas Act.

No comparable regulatory gap is presented by the Commission's ruling here that a company engaged in purchasing and reselling natural gas may also transport gas as a service for another without necessarily being deemed the purchaser of the gas thus transported. The transportation agreement gives the Commission a regulatory "handle" on the transaction that it lacked in *Lo-Vaca*. There, unless the transaction was deemed a sale, the Commission had no continuing authority over its terms. Here, in viewing the transaction as the transportation arrangement it purports to be, the Commission is still obliged to satisfy itself that the relevant terms—including the price of the transportation—are consistent with the public convenience and necessity. This, we stress, is the identical standard that the Commission applies when deciding whether to authorize the construction or use of transportation facilities needed to make a direct sale. And, as we have noted, the price for the transportation is subject to the Commission's continuing rate regulation to the same extent as would be the price for a sale of the gas to the pipeline.

There is an additional distinction between this case and *Lo-Vaca*. There, producers were selling gas at a price above the going price in the gas field, and the question was whether the Commission lacked juris-

diction over such sales. Here, there is no danger resulting from a failure to regulate major sales that could significantly affect the price of gas sold in the field. The arrangement between Texaco and Transco relates only to the transportation of gas that is to be consumed by the producer in its own operations.[4]

2. There is no merit to the contention (Pet. 16-19) that Texaco should have been required to obtain a certificate of public convenience and necessity for the operation of the 4½-mile span of pipeline between the point of redelivery and Texaco's refinery. The Commission's conclusion that Texaco's delivery line was in fact part of the refinery and that interstate commerce therefore ceased when Texaco accepted redelivery presents no issue of practical or general importance. As the court below explained (Pet. App. A, p. 8a), there is no inconsistency with this Court's decision in *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464. In that case, the Commission was held to have jurisdiction over a natural gas company owning and operating more than 100 miles of high-pressure lines within the State of Ohio and selling gas

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[4] The absence of any sale here distinguishes *Florida Gas Transmission Co.*, F.P.C. Docket No. CP 65-393, Opinion No. 516, decided by a divided Commission after its order in the present case. In that case, there was a sale by a producer in Louisiana to a power company in Florida and the gas involved in the sale was transported from producer to power company by an interstate pipeline. The only issue in *Florida Gas* was whether the sale by the producer to the power company was a nonjurisdictional direct sale to the power company, or a jurisdictional sale to the pipeline for resale to the power company; no such issue is presented in this case.

to more than one-half million consumers in Ohio from the company's own local distribution systems. Here, by constrast, Texaco's short line was to be used solely for its own immediate refinery purposes. Cf. *The Pipe Line Cases*, 234 U.S. 548, 562.[5]

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[5] The additional grounds of review advanced by petitioner are insubstantial. The claim that the examiner improperly relied upon facts he officially noticed from a later filing by Transco is belied by Section 7 of the Administrative Procedure Act and Section 1.26(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. 1.26(d), which permit official notice of facts so long as any party, on request, is given an opportunity to rebut them. Petitioner neither objected to the taking of official notice here nor sought an opportunity to rebut the noticed facts. The contention that the Commission should have required a present reduction in Transco's resale rates to compensate its present customers for the loss of "cheap expendability" has no application to the facts in this case, since it is based on the erroneous assumption that the pipeline's idle capacity would be committed to a non-jurisdictional activity and thus removed from continuing Commission jurisdiction over the transportation rates here involved. Finally, there is no substance to the argument that the Commission's denial of a certificate in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, also required a denial of the very different proposal here. Not only must each certificate case be decided on its own facts, but the factors considered decisive in the earlier case were not present here. No unregulated field sales are involved and no claim has been made that Texaco's use is an inferior use.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Federal Power Commission.

JUNE 1967.

APPENDIX

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, provides in pertinent part as follows:

> SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.
>
> * * * *
>
> SEC. 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or ex-

tension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *.

The Administrative Procedure Act, June 11, 1946, c. 324, 60 Stat. 237, 5 U.S.C. (1964 ed.) 1001-1011, provides in pertinent part as follows:

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the pub-

lished rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

> (d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Section 1.26(d) of the Federal Power Commission Rules of Practice and Procedure, 18 C.F.R. 1.26(d), provides:

> (d) *Official notice of facts.* Official notice may be taken of such matters as might be judicially noticed by the courts of the United States or of any other matter of technical or scientific fact of established character peculiarly within the general knowledge of the Commission as an expert body; *Provided*, That any party shall, on timely request, be afforded an opportunity to show the contrary.

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No. 1281

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, TRANSCONTINENTAL GAS PIPE LINE CORPORATION AND TEXACO INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TEXACO INC. BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF NORTHWEST JERSEY NATURAL GAS, INC., ET AL.

Rule 42(1) of this Court expressly provides that motions for leave to file briefs *amicus curiae* in support of petitions for writs of certiorari *are not favored.*

Texaco's Eagle Point Refinery is not located in Movants' franchised service areas and, therefore, Movants are not capable of rendering an alternative competitive gas service. Accordingly, they have been in no manner aggrieved by the decisions rendered by the Commission and court below.

Rule 42(3) requires motions for leave to file to concisely set forth the facts or questions of law that have not been adequately presented by the parties. Petitioner, Public Service Electric and Gas Company, is a gas distributor whose interests and business operations are similarly situated with those of Movants. There has been no showing that the interests of Movants will not be fully and adequately protected by Petitioner.

The arguments contained in the motion and brief filed by Movants are substantially identical to those contained in the petition for writ of certiorari filed by Public Service Electric and Gas Company in No. 1281. There has been no showing why an essentially duplicative presentation would be beneficial to the Court and justify an exception to the general rule that motions for leave to file briefs *amicus curiae* in support of petitions for writs of certiorari are not favored.

The motion should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 93

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, TRANSCONTINENTAL GAS PIPE LINE CORPORATION AND TEXACO, INC.,
Respondents.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION

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IN THE

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FEDERAL POWER COMMISSION,
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
TEXACO, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION

Petitioner's reasons on which it bases its request that certiorari be granted have been stated fully in its Petition. However, there are two issues on which the Respondent, the Federal Power Commission, contends certiorari should

be denied, and on which Petitioner believes further clarification would not be repetitious.

1. The Issue of Jurisdiction based on Commingling.

The Respondent, the Federal Power Commission, suggests that this Court deny certiorari with respect to this issue mainly because it contends that there is no "sale" in the field. This disregards the fact that Texaco receives gas by way of sale from other producers at its Paradis Gasoline Plant and delivers this gas to Transco. It also disregards the obvious sale which takes place in the field when Texaco purchases the interest that Royalty Owners have in the gas produced by Texaco and delivered to Transco. Further, it disregards the fact that in law the "exchange" of gas is itself a sale. More important, however, is the complete inconsistency in the Commission's reasoning. It contends before this Court that jurisdiction does not lie because there is "no sale in the field". Yet, in the *Florida Gas Transmission Company* case where there was an *undisputed* sale in the field, the Commission refused to assert its jurisdiction under the Natural Gas Act and specifically held that it did *not have jurisdiction.*[1] How then can the Commission reasonably contend that the absence of a "sale in the field" is the determinative factor which caused it to deny jurisdiction. Likewise, the fact that Texaco would *itself* use natural gas in approximately the same volumes that it delivered to Transco and which Transco would deliver to it in New Jersey, cannot seriously be considered an important non-jurisdictional factor because in the *Florida Gas* case, the Commission refused to accept jurisdiction where a *non-producer third party* purchased gas in Louisiana to be used to generate electricity in Florida.

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[1] *Florida Gas Transmission Company,* Docket No. CP65-393 decided March 1, 1967, ——— F. P. C. ———.

It is clear that the important issue of the boundaries of the Commission's jurisdiction cannot be relegated to a case by case decisional basis. The conflicting holdings of the Commission itself point to the serious need for a decision by this Court for the protection of consumers and the guidance of the industry itself.

As we have noted, the Commission in a line of cases commencing with *Connecticut Light and Power Company* and continuing through *Oklahoma Natural, Shell Oil, Colton, Rayne Field, Lo Vaca, Amerada, Sayre Field,* and *Louisiana Public Service Commission*, consistently asserted jurisdiction and, where challenged, was upheld on appeal.[2] In the instant case and the *Florida Gas* case the Commission has completely reversed its position and now seems determined to take a non-jurisdictional course.[3] This may be in the public interest. Petitioner, of course, is not charged with the obligation to resolve that issue. However, Petitioner and other utilities and industrial companies are entitled to know the ground rules governing jurisdiction. If the transportation of a producer's gas (acquired in part by production and in part through a sale), commingled with jurisdictional gas, for use by the producer in another state is to be held a non-jurisdictional transaction, such a regula-

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[2] *Connecticut Light and Power Company* v. *F. P. C.*, 324 U. S. 515 (1945), *Oklahoma Natural Gas Company*, 23 F. P. C. 291 (1960), *Shell Oil Company* 25 F. P. C. 1316 (1961), *F. P. C.* v. *Southern California Edison Company*, 376 U. S. 205 (1964), *United Gas Improvement Company* v. *Continental Oil Company*, 381 U. S. 392 (1965), *California* v. *Lo Vaca Gathering Company*, 379 U. S. 366 (1965), *F. P. C.* v. *Amerada Petroleum Corp.*, 379 U. S. 687 (1965), *Natural Gas Pipeline Co. of America*, 34 F. P. C. 1258 (1965), *Louisiana Public Service Commission* v. *F. P. C.*, 359 F. 2d 525 (1966).

[3] *Florida Gas Transmission Company*, Docket No. CP65-393, March 1, 1967——— F. P. C.———.

tory gap should not be determined by a denial of certiorari but only after this issue, of such general importance, has been briefed and argued by all parties concerned.

2. The Issue of the Denial of Fair Administrative Procedure.

The Respondent, the Federal Power Commission, minimizes this issue by merely referring to it in a footnote on the last page of its Brief. It characterizes the Hearing Examiner's procedure as the taking of official notice to which Petitioner did not object. This is an attempt to gloss over prejudicial error. Actually, strenuous objection to this procedure was timely made on Exceptions to the Commission and on Motion for Rehearing (see R. 238-248, 290, 295). It was also briefed and argued to the Court below.

So that it may be clear to the Court that this error should not be condoned and subsequently used as a precedent which would destroy the value of administrative hearings generally, Petitioner considers it appropriate to detail the facts as briefly as possible.

The Examiner noted that "As one of the main bases asserted for approval of its application Transco states that the proposal herein for interruptible service would utilize idle capacity and thereby aid it in operating its system at the highest possible load factor. * * *" (R. 192).

The Examiner further stated:

> "* * * The Examiner has *used certain exhibits attached to the application* in Docket No. CP64-96 as the basis for the following findings: (1) that upon the completion of the facilities now authorized by the Commission's order dated April 17, 1964, in Docket No. CP64-96, there will be annual unused firm contract

> capacity in Zone 3 sufficient to serve the 1965 estimated interruptible transportation proposed for Texaco; and (2) that Transco's load factor will be be improved. * * *" (R. 194) (Emphasis Supplied)

The Examiner recognized that in order to reach a determination that there would be sufficient unused capacity he would have to know:

1. The maximum daily contract deliveries;
2. the estimated annual deliveries to each consumer; and
3. the calculated average annual operating efficiency factor of the pipeline.

The second factor, estimated annual deliveries, was not supplied for the record by Transco. Therefore, the Examiner took the estimated annual deliveries from an exhibit attached to the application in Docket No. CP64-96. This entirely separate docket was uncontested, hence these estimated annual deliveries were never proven by a witness and no opportunity to test the validity of these estimates was afforded to Petitioner or to anyone else.[4] The maximum daily delivery figures (first factor) were in evidence in the instant docket (CP63-222) and thus there was no

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[4] It should be noted that in using these estimated annual deliveries he did not include all of them because he completely ignored the total volume of A. C. Q. (Annual Contract Quantity) gas which Transco is obligated to deliver annually to certain customers. If he had included this large volume of gas, the result of his calcuations would show that no unused capacity was available. Thus, his error was clearly prejudicial. If a witness had done this, he would have been subject to cross-examination and rebuttal. However, as this was done by the Examiner in his decisional process, no cross-examination or rebuttal was possible. Petitioner's only remedy was by way of Exception to the Decision. Respondents' charge that Petitioner made no objection is patently in error.

need for the Examiner to take official notice with respect to them. However, they were not the *same* as those in Docket No. CP64-96, so he discarded the figures of record and used the figures in Docket No. CP64-96 to determine the maximum daily deliveries. The efficiency factor of the pipeline was not contained in this record nor was it contained in Docket No. CP64-96. Thus, the Examiner made an assumption as to what he thought the efficiency factor might be.

This procedure of the Examiner in using allegations contained in exhibits attached to the application in another separate docket cannot be justified on the ground that it was merely the taking of official notice of a material fact of common knowledge. The statements contained in an application in another docket have no more evidentiary weight than allegations contained in a Complaint at Law. An application is a mere pleading and the only fact it is evidence of, is the fact that it was filed and contains the statements set forth therein.

The procedure used herein by the Examiner was clearly condemned by this Court in the *Catco* case (*Atlantic Refining Co.* v. *Public Service Commission, et al.*, 360 U. S. 378, 393), where it was held that conclusory findings cannot be made by the Commission where there is no record support.

The Commission in its two opinions ignored this issue. The Court below did not, in its opinion, discuss this prejudicial procedural error. This procedure by the Hearing Examiner involving technical calculations to arrive at pipeline capacity volumes can by no fair-minded standard be termed appropriate use of the Doctrine of Official Notice of a *material fact*. It resulted in a denial of due process of such a prejudicial nature as to require a rehearing.

CONCLUSION

Petitioner contends that the issues contained in this case are all of such importance and have such a broad impact on the public interest as to justify granting the Writ of Certiorari herein.

It is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: July 18, 1967